

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-2125

United States Court of Appeals  
FOR THE SECOND CIRCUIT

Docket No. 76-2125

SAMUEL SANTORO,  
*Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA,  
*Respondent-Appellee.*

On Appeal from the United States District Court  
for the Southern District of New York

JOINT APPENDIX

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76-2125

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 76-2125

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SAMUEL SANTORO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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J O I N T   A P P E N D I X

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PLAINTIFFS

DEFENDANTS MELLACK, J.

SANTORO, SAMUEL

UNITED STATES OF AMERICA

9/29

CAUSE

To Vacate Judgment of conviction.  
Related Cases-71 Cr. 8&71 Cr. 1313 (MP)

ATTORNEYS

Wall & Deck  
36 West 44th St. NY 10036 686-6683

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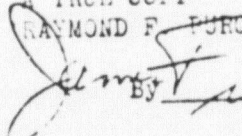
76 Civ. 3444 SAMUEL SANTORO VS. USA

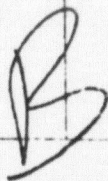
POLLACK, J.

76 Civ. 3444

DATE	NR.	PROCEEDINGS
08-04-76	1	Filed Petition to vacate sentence.
08-04-76	2	Filed Petitioner's Memorandum of Points and Authorities in support of motion to vacate sentence.
08-10-76	3	Filed affdvt by Michael D. Abzug for respondent in opposition to petitioner's motion to vacate sentence.
08-10-76	4	Filed Govt's Memorandum of Law.
08-05-76	5	Filed Petitioner's Memorandum of points & Authorities in support of motion to vacate sentence.
08-05-76	6	Filed Petitioner's petition to vacate sentence.
09-23-76	-	Filed Memo end, on document #1. Petition to vacate sentence is in all respects denied. So Ordered. Pollack, J. (-n)
09-29-76	7	Filed Petitioner's Notice of Appeal from order of USDC, SDNY denying Petitioner's petition to vacate sentence entered 9/23/76. (Mailed copy to AUSA Michael D. Abzug, Esq. on 9/29/76)

TRUE COPY  
RAYMOND F. BURGHARDT, Clerk

By  Deputy Clerk





PETITION TO VACATE SENTENCE

Petitioner Samuel Santoro, by his attorneys, for his petition to vacate sentence pursuant to 28 U.S.C. § 2255, alleges as follows:

1. Petitioner is incarcerated at the Federal Penitentiary at Leavenworth, Kansas.
2. Petitioner was convicted after trial by jury of multiple counts of violating the Extortionate Credit Transactions Act, 18 U.S.C. §§ 891 et seq., and of conspiracy, in violation of 18 U.S.C. §§ 371. (Docket No. 71 Cr. 8). Petitioner pleaded guilty to failure to appear in violation of 18 U.S.C. § 3150. (Docket No. 71 Cr. 1313).
3. On January 25, 1972, the Honorable Milton Pollack of the United States District Court for the Southern District of New York sentenced petitioner to a term of twelve years imprisonment: five years on Count One and seven years on Counts Two through Sixteen, the seven-year sentence to be served consecutively to the five-year term. The Court also imposed a five-year concurrent term for failure to appear. Petitioner began serving those sentences immediately.
4. Petitioner's conviction was affirmed on appeal by the United States Court of Appeals for the Second Circuit. United States v. Tortora, 464 F.2d 1202, cert. denied, sub nom.

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Santoro v. United States, 409 U.S. 1036 (1972) (Douglas, J., dissenting).

5. Petitioner has not filed a similar application for relief pursuant to 28 U.S.C. § 2255.

6. Petitioner asserts that he was denied effective assistance of counsel at trial. His counsel did not have adequate time to consult with petitioner and to prepare the case before trial; they did not have an opportunity to consult with petitioner during trial; and they called no witnesses on his behalf.

7. Petitioner further asserts that he was denied his right to be present at trial to face his accusers. The trial was conducted entirely in his absence, from the impanelling of the jury to the rendition of verdict.

#### EVENTS PRIOR TO TRIAL

8. Petitioner was indicted in January 1971, with co-defendants Joseph Chiaverini, Gene Genaro, John Tortora and Nicholas Ratteni. Petitioner pleaded not guilty to all charges and was released on bail. He retained Vincent Lanna of the firm of Lanna, Coppola and Rosato in Manhattan to represent him in this case.

9. The case was set for trial on April 15, 1971. On April 15, counsel for all parties conferred with this Court to establish a new date for trial when all counsel would be available. Peter Rosato appeared on behalf of Vincent Lanna who was in trial on another case that day. Rosato informed the Court that Mr. Lanna had military obligations for most of the month of August and, thus, could not appear during that time. Nevertheless, the Court set trial for August 10, 1971 and instructed Rosato

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FORM NO. 100-1  
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that petitioner should find substitute counsel if Lanna would not be able to appear.

10. On July 21, 1971, Lanna wrote to this Court reiterating that he was unable to be present for trial on August 10. He further explained that petitioner strenuously objected to seeking new counsel for the case. In a letter dated August 3, 1971, the Court responded to Lanna's letter informing him that he was not excused from his obligations as an officer of the Court. On August 5, 1971, Mr. Lanna again wrote to the Court stating that Mr. Rosato would appear with petitioner on August 10 in accordance with the Court's directive but that petitioner had not authorized Rosato to represent him. (Copies of the July 21, August 3 and August 5 letters are attached hereto as Exhibits 1, 2 and 3.)

11. Upon information and belief, Mr. Lanna attempted until shortly before the date set for trial to reschedule his military obligations. His efforts were unsuccessful. (Transcript, August 10, 1971, p. 57, copy attached hereto as Exhibit 4.)

12. On August 10, petitioner appeared in Court accompanied by Mr. Rosato. The Court assigned Rosato and another lawyer, Mr. Mark Landsman, to represent petitioner. Rosato protested that he had very little experience in criminal cases, that he had never tried a case in federal court, and that he was not admitted to practice in the Southern District of New York. Petitioner voiced his opposition to going forward with two attorneys who were not prepared and again requested that the trial be delayed until Mr. Lanna could be present. The Court denied the request and reaffirmed the appointment of Rosato and Landsman. (Transcript, August 10, 1971, pp. 50-61, copy attached hereto as Exhibit 4.)

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321 5900



13. Defendants Chiaverini and Tortora failed to appear on August 10. Both were hospitalized at the time. The Court ordered an examination of the two defendants and determined that their absence was legally inexcusable. Because of their absence, however, no questioning of jurors or other proceedings took place. The trial was continued until August 16.

14. Upon information and belief, between August 10 and August 16, petitioner's appointed lawyers conferred with him only once. They did not confer with him after August 12. (Transcript, August 16, 1971, pp. 54a-65a, copy attached hereto as Exhibit 5.)

#### TRIAL

15. On August 16, petitioner was not present for trial. No explanation for his absence was offered. The Court found in the face of no evidence to the contrary that the absence was voluntary and deliberate and ordered that the trial go forward. Counsel for petitioner objected and moved for severance. The motion was denied. (Transcript, August 16, 1971, pp. 64a-71a, 107-108, copy attached hereto as Exhibit 5.)

16. Upon information and belief, the prosecution of petitioner and his co-defendants was a complex one. Upon information and belief, the trial lasted from August 16 through August 24, 1971; numerous witnesses testified; and the jury was called upon to listen to garbled recordings of taped conversations. Pursuant to 18 U.S.C. § 3500, during the course of the trial the Government released to defense counsel voluminous transcripts of conversations between the prosecutors and Government witnesses.

17. Upon information and belief, the Government viewed petitioner as a central figure in the case against all five

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co-defendants. (Transcript, August 10, 1971, p. 76, copy attached hereto as Exhibit 4.)

18. Upon information and belief, repeatedly throughout the trial, petitioner's counsel renewed the motion to sever. They stated that they were unable to defend their client and to effectively cross-examine witnesses without the opportunity to consult with him. The motion was denied on each occasion. (Transcript, August 16, 1971, pp. 74a-76a, copy attached hereto as Exhibit 5).

19. The Court dismissed the indictment against Genaro for insufficient evidence. The jury acquitted Ratteni and Chiaverini and convicted Tortora and petitioner.

20. At sentencing on January 25, 1972, petitioner explained through counsel that he had fled because he feared relying on unprepared counsel to defend him against the serious felony charges he faced. (Transcript, January 25, 1972, pp. 1-7, copy attached hereto as Exhibit 6.)

21. On January 25, 1972, Mr. Rosato moved that the verdict against petitioner be set aside because of petitioner's absence from the trial. The motion was denied and the Court imposed sentence. (Transcript, January 25, 1972, pp. 1-7, copy attached hereto as Exhibit 6.)

WHEREFORE, petitioner respectfully prays that this Court

- (1) vacate sentence, set aside the judgment of conviction and order petitioner's immediate release from confinement;
- (2) order that this case be handled on an expedited basis and that a response be required within ten days of service of this Petition; and

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(3) grant such other relief as the Court deems  
just, equitable and proper.

Respectfully submitted,  
WILLIAMS, CONNOLLY & CALIFANO

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PIERCE H. O'DONNELL

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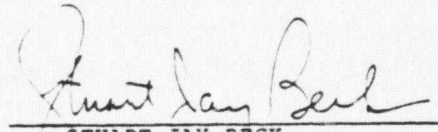
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VERIFICATION

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.

The undersigned, an attorney admitted to practice in the courts of New York State, affirms under penalty of perjury that deponent is co-counsel of record for the petitioner; that deponent has read the foregoing Petition and knows the contents thereof; and the same is true to deponent's own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true. Deponent further says that the reason this verification is made by deponent and not by petitioner is that petitioner is incarcerated at the federal penitentiary at Leavenworth, Kansas and has retained counsel to prepare this petition and its accompanying memorandum.

  
STUART JAY BECK



INDEX OF PETITIONER'S EXHIBITS

- Exhibit 1      Letter of July 21, 1971 from  
                 Vincent Lanna to the Honorable  
                 Milton Pollack
- Exhibit 2      Letter of August 3, 1971 from  
                 Rose A. Lanci, Judge Pollack's  
                 secretary, to Vincent Lanna
- Exhibit 3      Letter of August 5, 1971 from  
                 Vincent Lanna to the Honorable  
                 Milton Pollack
- Exhibit 4      Transcript of August 10, 1971  
                 (excerpts)
- Exhibit 5      Transcript of August 16, 1971  
                 (excerpts)
- Exhibit 6      Sentencing Transcript, January  
                 25, 1972 (excerpts)

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## EXHIBIT 1

July 21, 1971

Hon. Milton Pollack  
District Judge  
Southern District of New York  
United States Courthouse  
Foley Square  
New York, New York

Re: U. S. A. against Santoro, et al  
71 Cr. 8

Dear Judge Pollack:

In connection with the above case, and as you are aware, the undersigned represents the defendant, Samuel Santoro. I was apprised by Mr. Rosato who appeared in my behalf at a pre-trial conference that this case has been ordered on for trial before yourself on August 10, 1971. It is my understanding that Mr. Rosato informed the Court that commencing on August 9th through August 29th, I would be on a tour of active duty as commandant of the Non-Commissioned Officers Academy located at Camp Smith New York. I was further informed that your Honor directed that regardless of said Army Reserve Commitment, it was your directive that the case would proceed to trial on that day and in my absence Mr. Santoro would have to arrange for other counsel.

I have discussed this in depth with Mr. Santoro and he is equally as insistent that I represent him. I have explained to him that I am unable to represent him in view of your trial direction but he refuses to accept any other counsel.

As a result, and my last conversation with Mr. Santoro taking place only last evening, I felt compelled to write and advise you of the present posture regarding this representation and in addition, I instructed Mr. Santoro to appear in your Court on the morning of



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August 10th.

A copy of this correspondence is being forwarded  
to all counsel involved.

Very truly yours,

Vincent W. Lanna

VWL:bt



## EXHIBIT II

UNITED STATES DISTRICT COURT  
Southern District of New York  
United States Court House  
New York, New York 10007

Milton Pollack  
Judge

August 3, 1971

RE: U.S.A. v Nicholas Rattenni, et al  
71 CR. 8 (MP)

Dear Sirs:

I am instructed by the Court to notify you that:  
The trial will proceed as scheduled and that counsel  
and their clients are to act accordingly. The Court's  
directive was clear and no tactical devices or obstruc-  
tive procedures will be permitted to circumvent the  
trial arrangements stipulated on the record. Your  
partner was present when all counsel requested and agreed  
on the trial date and the Court's calendar was arranged  
accordingly. You are referred to the record of the  
proceedings.

Your belated letter is unacceptable as an adequate per-  
formance of the obligations of an officer of the Court  
entitled to the privileges appertaining thereto.

Very truly yours,

s/ Rose A. Lanci

Rose A. Lanci

Secretary to Judge Pollack

cc:  
Vincent J. Lanna, Esq.  
Roy M. Conn, Esq.  
Alfred J. Deiso, Esq.  
Michael P. DiRenzo, Esq.  
Frank Healy, Esq.  
Joel M. Friedman, Esq.



## EXHIBIT III

August 5, 1971

Hon. Milton Pollack  
District Judge  
Southern District of New York  
United States Courthouse  
Foley Square  
New York, New York

Re: U. S. A. against Santoro, et al  
71 cr. 8

Dear Judge Pollack:

I am in receipt of your letter (through your secretary) dated August 3, 1971 and I am somewhat surprised in view of what my partner informed me as stated in my letter of July 21, 1971.

Mr. Rosato, my partner, is very clear in his recollection that he never, in my behalf "requested" or "agreed" on the August 10th trial date. In fact, his recollection is that Mr. Cohen, Mr. Dierenzo and Mr. Healy agreed on that date and he explicitly informed the Court that I would be available during the last two weeks of July, but that I would certainly not be available on August 10th because of my Military Commitment. Mr. Rosato also recalls the Court informing him that the trial will, in any event, be held on August 10th and that my office will be held responsible for Mr. Santoro's appearance on that date with counsel. Assuming what Mr. Rosato has stated is correct, then certainly the record should so reflect.

As reflected in my letter of July 21, 1971, I have made every effort to persuade Mr. Santoro to retain other counsel but he has adamantly refused to do so.



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-2-

In any event, Mr. Rosato will appear with Mr. Santoro on August 10th to demonstrate our ethical posture in this case but Mr. Santoro has not authorized Mr. Rosato to proceed to trial as his attorney.

Very truly yours,

VINCENT W. LANNA

WVL:bt



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2 performance of the obligations of an officer of the court  
3 entitled to the privileges appertaining thereto."

4 When I said this was agreed to on the trial record,  
5 what I was saying was that those who found themselves in-  
6 capable in any way of proceeding as directed were to afford  
7 satisfactory substitutes. I think the conduct of Mr. Lanna  
8 in this connection doesn't meet the obligations of an officer  
9 of this court.

10 I propose to do the following. You are Mr. Lanna's  
11 partner, you have been involved in this case in one or  
12 another aspects since the response to the indictment. My  
13 record shows here that you signed an appearance, Peter P.  
14 Rosato, for Vincent W. Lanna, in the case of Santoro, and  
15 if my recollection serves me correctly, you signed for Mr.  
16 Lanna also a notice of appearance for Gene Genaro who has  
17 since come into the case through Mr. Healey.

18 Under the powers of the Court, I assign you to  
19 represent Mr. Santoro in this case, and I direct that you  
20 be present on each and every occasion that any proceeding  
21 in this matter goes forth and during the entire course of  
22 the trial.

23 I will also, should you so request it and should  
24 your client so request it, designate further counsel to  
25 assist Mr. Santoro and yourself, if you so desire, and

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[51]

lhbr 4

1  
2 in that connection I have asked a lawyer of sufficient  
3 ability in the opinion of the Court and having the confidence  
4 of the Court to appear here this morning to find out whether  
5 or not additional counsel is desired. Is Mr. Landsman  
6 in court?

7 MR. LANDSMAN: Yes, your Honor.

8 THE COURT: Mr. Mark Landsman has stated that he  
9 would be in court this morning. He has now heard the  
10 entire situation, and it is up to you, Mr. Rosato, as one  
11 of the assigned counsel directed to appear and proceed in  
12 this matter, to discuss the matter with your client, Mr.  
13 Santoro, as to whether or not you desire to associate Mr.  
14 Landsman with this case.

15 MR. ROSATO: Your Honor, may I be heard?

16 THE COURT: You definitely may be heard.

17 MR. ROSATO: Firstly, your Honor, I have never  
18 actively participated in this case, except --

19 THE COURT: This will be your opportunity to do  
20 so.

21 MR. ROSATO: I just wanted, insofar as passing, to  
22 say I have never actively participated in any part of this  
23 case, except as a leg man, so to speak, for Mr. Lanna, who  
24 happened to be on that day on trial. He merely asked me  
25 to appear in his behalf. Whatever appearance I may have



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made in court has always been for Mr. Lanna and never on my own.

Secondly, as I understood your Honor's direction last April, I believe Mr. Lanna, and I conveyed that direction to Mr. Lanna, I believe Mr. Lanna has carried out your direction. He has made every effort to persuade Mr. Santoro to seek other counsel.

THE COURT: That's not what the directive was.

MR. ROSATO: He has informed Mr. Santoro that he absolutely was not available to try the case on August 10th and that he himself must decide to either get new counsel or try the case without counsel, but he must make that decision, and he informed Mr. Santoro on several occasions on that point starting last April or May when I first conveyed this direction to Mr. Lanna.

THE COURT: Just to break in on your thought, Rule 4 of the rules of this court directs that no lawyer shall be relieved except on order of the Court for good cause shown.

MR. ROSATO: I believe your Honor --

THE COURT: Mr. Lanna has not been relieved, and I will deal with the subject of Mr. Lanna separately on another occasion.

MR. ROSATO: As we understood your direction, we thought we understood your direction to be that we should

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FOLLY SQUARE, NEW YORK, N.Y. 10014-5000

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lhbr 6

2 make every effort to obtain other counsel or assist Mr.  
3 Santoro to obtain other counsel or urge him to obtain other  
4 counsel, and we have done that to the best of our ability.  
5 At least Mr. Lanna has stated that he has done that to the  
6 best of his ability.

7  
8 Thirdly, I might say that although I am a practicing  
9 attorney, I have only actually been in continuous  
10 criminal practice for one year, I have tried very, very few  
11 cases, criminal cases. I have never practiced in the Federal  
12 Court. I am totally unfamiliar with federal law and pro-  
13 cedures. I am totally unfamiliar with the facts of this  
14 case and the crimes charged in this case. I have never  
15 been privy to any conversations, strategy or defense con-  
16 sultations, with Mr. Santoro or with my partner or present  
17 when these conversations took place.

18 I have no knowledge of any defense, if any, that  
19 Mr. Santoro has in this case.

20 THE COURT: I am sure that your presence will be  
21 an aid and comfort to Mr. Santoro and my direction that you  
22 are assigned stands.

23 MR. ROSARIO: I only bring that to your Honor's  
24 attention for the record. I thought you said that you con-  
cluded that I was adequate counsel, and I just want to remind  
the Court that I don't know what you base that on --



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Lhbr 7

THE COURT: I have provided for you an available addition which your client and you may accept as your pleasure.

MR. ROSATO: Is he assigned by the Court or does he have to be --

THE COURT: That is a subject that I will discuss with you after your client, you and Mr. Landsman have a conversation.

MR. ROSATO: All right.

MR. FRIEDMAN: Your Honor, might I suggest that the Court inquire whether Mr. Santoro wishes to appear pro se.

THE COURT: That inquiry is not appropriate until after Mr. Santoro and Mr. Rosato have talked to Mr. Landsman. That takes care of the appearances for the moment.

Is there any report from these gentlemen in the hospital?

MR. DIPENZO: I communicated with the hospital and spoke to Mr. Chiaverini. He tells me that he has just been given two hypodermic needles and that they are taking him down for additional tests, which tests they are going to require. I understand they are very painful, they will require a general anesthesia.

I advised him, consonant with your Honor's



8-10-71

1 hbr

[ 55 ]

2 directive, told him exactly what your Honor has done.  
 3 I am conveying the message.

4 THE COURT: Thank you.

5 Mr. Chapman?

6 MR. CHAPMAN: I spoke to Mr. Tortora as well at the  
 7 hospital. He advises me that in the early hours of this  
 8 morning he had another very severe attack. While I was  
 9 talking to him he had just about started, maybe five or ten  
 10 minutes before, an intravenous injection, which is the usual  
 11 treatment of peridine, which is an opium, and as I was in-  
 12 formed by the doctor, and other drugs, and that the usual  
 13 treatment lasts between five and nine hours.

14 THE COURT: In short words, is he coming or isn't  
 15 he?

16 MR. CHAPMAN: He cannot come.

17 THE COURT: All right. The Court will take a  
 18 15-minute recess. Mr. Friedman, you do whatever is necessary  
 19 under the circumstances and I will hear from you again. Bear  
 20 in mind, gentlemen, that against this peremptory trial date  
 21 the government has gone to great expense to have that panel,  
 22 and it is sitting out there and costing the government  
 23 \$2,000 or more for the convening of that panel while these  
 24 gentlemen take these optional -- apparently optional treat-  
 25 ments at St. John's Hospital.

26 We will stand in recess for 15 minutes.

(Recess.)



8-10-71

[ 56 ]

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THE COURT: Mr. Rosato, have you got anything to report to the Court with respect to our problem?

MR. ROSATO: I have spoken to Mr. Santoro, and perhaps it would be better if Mr. Santoro just told the Court what he feels.

THE COURT: All right. Come forward, Mr. Santoro.

DEFENDANT SANTORO: Your Honor, I talked with Mr. Landsman, and he says that he knows nothing of the case, he has no background or anything of the case. And I also talked to Mr. Rosato, and he seems to know nothing about it at all either. The only one that knows anything about it is Mr. Lanna.

THE COURT: That was a subject that you were given adequate notice of on April 15th. The word on April 15th was that you are required now, meaning then, April 15th, to get yourself an adequate substitute. So your choice at the present time to go forward by yourself without a lawyer, which would be foolish, to go forward with the assistance of Mr. Rosato and to supplement that assistance, if you want, with the assistance and advice of an experienced lawyer like Mr. Mark Landsman. You can make the choice.



8-10-77  
[57]

1 lha2

2 The case cannot be delayed for the third of  
3 the opportunities of Mr. Lanna to go off marching in  
4 his duties. That's something that should have been  
5 provided for on April 15th.

6 Now, Mr. Rosato reports that they repeatedly  
7 urged you to make other arrangements. The fact that  
8 you did not is your responsibility.

9 DEFENDANT SANTORO: Your Honor, I spoke  
10 with Mr. Lanna several times, and up until about, I would  
11 say, approximately two weeks ago he was still trying to  
12 get that this reserve thing, whatever he has--he was  
13 still trying to get a postponement so that he could be  
14 here.

15 Then when he called --

16 THE COURT: We are in a practical situation,  
17 as you can see. You can't have, in a multiple-party  
18 case, somebody falling out of step. The whole thing  
19 can't just wait on somebody's reserve duties, or what  
20 ever it is, because I assure you that in two weeks from  
21 now some other lawyer is going to have a problem and  
22 some other client is going to have a problem.

23 So you try to accommodate all of those  
24 problems as best you can by having advance notice. You  
can go forward by yourself. Do you want to go forward



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1 I had

2 by yourself without a lawyer?

3 DEFENDANT SANTORO: No, I don't want to  
4 go forward without a lawyer, no.

5 THE COURT: I have assigned Mr. Rosato  
6 to sit here to help you and advise you. You now have  
7 the opportunity to employ or to utilize Mr. Landsman.  
8 Do you want him?

9 DEFENDANT SANTORO: Do I want this Mr.  
10 Landsman?

11 THE COURT: Yes.

12 DEFENDANT SANTORO: I don't know, your Honor.  
13 From what I talked to him, he doesn't know anything  
14 about it.

15 THE COURT: It is up to you to inform him  
16 sufficiently, because your choice is to have been ready  
17 at 10 o'clock this morning, and to be ready with a lawyer  
18 or to go forward by yourself.

19 Now, the next best thing is, instead of  
20 going forward by yourself, to get whatever assistance  
21 you can out of these two lawyers or one of them, which-  
22 ever you prefer.

23 DEFENDANT SANTORO: Your Honor, from what I  
24 understand now, I am the key figure in this. I mean,  
they are looking to put me behind bars.



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[57]

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2 THE COURT: I am not discussing whether you  
3 are a key or a lock or anything like that. That's  
4 not before me. The problem is how do you want to  
5 go forward. We are going to go forward. We are going  
6 to arrange about these other gentlemen who claim to be  
7 sick. How do you want to go forward? I intend now  
8 to adjourn court until 2 o'clock. Maybe we will go for-  
9 ward at 2 o'clock if the circumstances are such. If  
10 not, then we will go forward definitely tomorrow morning.

11 In the meantime, it is up to you to get  
12 whatever assistance as you can from the lawyer who is  
13 already assigned, Mr. Rosato, and who is a partner of Mr.  
14 Lanna and who I am sure can get the open sesame to all  
15 of the locked-in ideas that Mr. Lanna has. And if you  
16 want, you can retain or have the Court supply you with  
17 the services of Mr. Landsman. You can make up your mind  
18 what you want to do.

19 DEFENDANT SANTORO: Your Honor, can I ask you  
20 this: Is there any way that Mr. Lanna can be brought  
21 into this case? Is there any way the Court could have  
22 him here or what?

23 THE COURT: If you can persuade him to  
24 come, I am not going to --

25 MR. ROSATO: Your Honor, if I may say, Mr.



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Lanna being in Camp Smith is not of his own volition.  
He is under orders out of Washington --

THE COURT: I don't want to get mixed up  
with the U. S. Military.

MR. ROSATO: I want to show he is not here  
not out of his own choice.

THE COURT: I don't want to get mixed up  
with the U. S. Military, and whether those orders were  
subsequent or prior to the Court's order --

MR. ROSATO: They were prior to, far prior.  
I would like the record to show that Mr.  
Santoro was not in court on April 15th.

DEFENDANT SANTORO: No, I wasn't here, your  
Honor.

MR. ROSATO: recalls that.

THE COURT: I thought I recalled his pre-  
sence here.

MR. ROSATO: He was not.

THE COURT: The record is perfectly clear  
and you have discussed it many times, as you said, so  
that there is no question of lack of notice. Let's not  
go hunting for squirrels while we are interested in the  
bear. We are interested now in how do you want to go  
forward. That you will go forward, I assure you.



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[6.]

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2 But how do you want to do it? Do you want to do  
3 it only with Mr. Posato? Do you want to do it with  
4 Mr. Landsman, too, to the extent that he can give  
5 you advice, suggestions, counsel, bring out the matters  
6 that have to be brought out and attend to your aspect  
7 of the trial as best he can? That's your question that  
8 you have to decide.

9 DEFENDANT SANTORO: Could I speak to them  
10 about this?

11 THE COURT: Sure, go right ahead.

12 Is Mr. Friedman still engaged?

13 MR. KAPLAN: Mr. Friedman is speaking  
14 to the marshals. I would like to report briefly on our  
15 efforts to get a doctor. We have gotten the police  
16 surgeon for the Westchester Parkway Police, Dr. Schneider.

17 THE COURT: The Court will order that that  
18 that doctor go over to the St. John's Hospital to  
19 examine both of these people, and immediately at the  
20 conclusion of the examination to communicate with the  
21 Court, an oral report, to be followed up in due course  
22 with a written confirmation of the report.

23 Mr. DiRenzo, you have no objection to the  
24 examination?

25 MR. DIRENZO: No.



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2 THE COURT: Mr. Durenzo, I have nobody in  
3 mind at this moment, but I assure you that I will seek  
4 the best available medical opinion that is available to  
5 make a medical examination and report, and the minute I  
6 ascertain who that is, my office will give you the in-  
7 formation.

8 MR. DURENZO: I just want an opportunity  
9 for his personal physician.

10 THE COURT: I will work on that this after-  
11 noon. I will probably call up the New York Medical  
12 Society and find out who is available.

13 MR. DURENZO: Thank you, your Honor.

14 MR. LANDSMAN: Your Honor --

15 THE COURT: Are you now in the case?

16 MR. LANDSMAN: It looks like I am to some  
17 extent, your Honor. There are some things that I  
18 think have to be worked out. However, I have had  
19 an opportunity to talk to some of the attorneys in this  
20 case over the lunch break, and they have been very coopera-  
21 tive, and I suddenly found myself with a defendant who  
22 apparently appears to be the main defendant or close to  
23 the main defendant in this case.

24 THE COURT: I don't think that this is the  
25 time to characterize the unimportance or importance of



[ 8 ]

every reason to believe that he will be here.

Mr. Fosato spoke to him as late as 11.30 last night but he is just not here yet.

THE COURT: He is not sick, is he?

MR. LANDSMAN: As far as I know, he is not, but

I assume he will be here.

THE COURT: Let's see if you can find him.

How about you, Mr. Healey?

MR. HEALEY: Ready.

THE COURT: Mr. Dizenzo?

MR. DIZENZO: Your Honor, as far as I am concerned,

the defendant is physically present and ready, that is,

Chiaverini. But I would like to see the medical report

that was rendered on Chiaverini because up to this point

I haven't seen it.

THE COURT: There is a comprehensive one being typed up and it is going to be sent down, and it will be

furnished to you today for your guidance and it is

further guidance in the event of any medical treatment.

I have asked the hospital to send down the

Westchester records, the New York records, the records of

each of the specialists, the interns, and all the others

so that you will have provided for you not only the medical

assistance that was provided but actually the reports for



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record purposes.

MR. DIRENZO: If I have some motions that I would like to make with reference to it may I reserve those motions, your Honor, until I have had an opportunity to examine those reports?

THE COURT: Nothing is reserved. When you think you have a motion, make it.

MR. DIRENZO: Thank you, your Honor.

(Pause)

THE COURT: Is there anything else of a house-keeping nature that you can think of?

MR. COHN: If your Honor has a few minutes, I think I can help kill them.

I wanted to add as exhibits which I think we might offer as additional exhibits with reference to the publicity motion, your Honor, the motion for a severance and continuance, four more articles containing the references to Mr. Mattanni as the head of whatever it is in Westchester, and somewhat specific reference to this trial, and I just ask that those be made part of the record.

THE COURT: Will you please identify the newspaper, the date?

MR. COHN: The Daily News, August 11, 1971, the Yonkers Herald Statesman --



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THE COURT: Is there a page number or a title?

MR. CORN: Page 12. The title is "Two No-Shows Delay Rattenni's Extort Trial," and one thing that concerned me about that, I suppose, is that the panel was reading the newspapers last week.

The Herald Statesman, August 10, 1971, page 1.

And it is of the same general nature.

August 4, 1971, the Daily News, which contains another reference to this exacta horseracing inquiry with references to Mr. Rattenni, and that's on page 3.

And finally July 29, 1971, a headline in the Yonkers newspaper, the Home News and Times, page 1, "Charge Del Bello Met Rattenni," apparently referring to the fact that an allegation by some political candidate that Mr. Rattenni, who was engaged in a number of businesses in Westchester, had a meeting with the mayor, and it goes into Mr. Rattenni's background, and all of that.

Now, your Honor, the other thing I wanted to bring to your attention was this: I very much appreciate and understand your Honor's desire for expedition here which couldn't be better demonstrated than by your returning in the middle of a vacation to accommodate all of counsel.

I am in a jam which doesn't start until the middle of next week, but I have a series of radio and

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television engagements which I had put off -- well, I put them off two weeks in a row to allow plenty of time for this trial, and of course we lost a week last week, certainly not due to your or Mr. Rattenni's or my fault, and hopefully we are not going to go to the jury -- my client won't -- if your Honor grants the motion, but if your Honor doesn't, I am going to be in a jam.

Now, I am just alerting the Court to this without even being told by your Honor to do it.

I am already trying to change them once again. There are seven of them. If I can change them we have got no problem. If I can't I'm in trouble. But I just wanted to alert the Court to that.

THE COURT: You just maintain your nice smile and sunburn and you can make your television appearances after the case is over.

MR. COHN: If it can be done, your Honor, I am certainly going to try.

THE COURT: Anybody else have any housekeeping item?

(No response.)

THE COURT: Now, as soon as we have disposed of this matter, whichever way it is disposed of, I will ask that the courtroom be cleaned because we need all of

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the seats for the panel. We have a very large panel to select from, and then the spectators will be allowed in as seats become available, and that is to the extent that they are available.

MR. COHN: Your Honor, in the case of Mr. Santoro not being here, I most respectfully suggest that that situation could be vigorously pressed now if we are going to start running into another week of something or other.

THE COURT: It will be vigorously pressed, you can be sure of that.

I think that some urgent telephone calls ought to be made by counsel.

MR. ROSATO: Your Honor, I made three calls this morning, two while I was here and one while at home. I left a number out there and I left the number of your Honor's chambers here so that if anything happened they would call either your Honor or the number out in the hall.

THE COURT: This is a hearing in connection with John Tortora.

GEORGE GRAYSON, called as a witness by the Court, being first duly sworn, testified as follows:



Grayson-cross

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2 small dose.

3 MR. CHAPMAN: That's all, your Honor.

4 THE COURT: Any further examination, Mr.

5 Friedman?

6 MR. FRIEDMAN: None, your Honor.

7 THE COURT: The Court finds that there is no  
8 reason why this defendant should not stand trial on the  
9 basis of the information given to the Court from the Medical  
10 Service and the witness' testimony, and the Court's own  
11 observation of the defendant in court.

12 He appears and the Court finds that he is  
13 thoroughly competent to stand trial and to participate  
14 in all phases of it with his counsel and in his own  
15 defense.

16 You may step down.

17 (Witness excused.)

18 THE COURT: Now, with respect to this defendant  
19 who has absented himself from court for an hour, although  
20 he was in court the other day and knew what the situation  
21 was, tardiness on the part of anyone will result in incon-  
22 venience to every lawyer and every defendant in the case  
23 and to the Court and all others, and it will be dealt  
24 with accordingly.

25 In the meantime, and in an effort to expedite



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2 matters, we will bring the jury panel in and hopefully  
3 this defendant will show up.

4 The United States marshals in the meantime are  
5 requested to begin an investigation to determine what they  
6 can about this man's whereabouts because there won't be  
7 any consideration shown to anybody who thinks he is going  
8 to derail this proceeding.

9 The marshal may clear the courtroom accordingly  
10 and the spectators will be allowed to be readmitted as  
11 the seats become available.

12 (Pause.)

13 THE COURT: Ladies and gentlemen, just relax  
14 for a moment. We are expecting somebody here very shortly  
15 and we will be ready to go ahead.

16 I have asked you to come in so that there will  
17 be no undue delay, but we are basically in recess at the  
18 moment.

19 (Pause.)

20 (In the robing room.)

21 THE COURT: Gentlemen, it is now 11.15. The  
22 defendant Santoro, with full knowledge of the fact that  
23 this case was to go to trial at ten o'clock this morning,  
24 has been absent from the courthouse and has failed to appear  
25 for trial.



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[ 18 ]

Both his counsel are present and I would like to have whatever explanation his counsel may wish to place on the record, and also their last communications with the defendant, and in respect of any matter that could shed light on the present situation.

We have sitting out there a panel of 100 or more veniremen, and we have all of the other defendants in court, including the two whose bail was revoked, and who were remanded following their claim that they were ill when it was established to the satisfaction of the Court that they were available for trial.

What is the situation with respect to Mr. Santoro?

MR. LANDSMAN: Well, your Honor, as far as I am personally concerned, the last time I saw Mr. Santoro was on Thursday at approximately one p.m.

I have had no contact with him since that time.

THE COURT: Thursday was August 13, 1971.

MR. LANDSMAN: Yes, your Honor.

MR. DIRENZO: The 12th.

THE COURT: August 12th, 1971.

MR. LANDSMAN: Yes, sir. And that was in midtown Manhattan, and that was the last time I saw him,



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when I left him.

THE COURT: Have you spoken at any time since that time to him?

MR. LANDSMAN: No, your Honor.

THE COURT: Now, Mr. Rosato, what is the situation?

MR. ROSATO: The last time I saw Mr. Santoro was the same time as Mr. Landsman did. We all parted company at that time. But I did speak with him on the telephone last night at approximately 11.30 p.m.

He had called my home after I had left a message at his home for him to call me and we only spoke about arrangements for this morning as to how we would travel to court, and he gave me every indication that we would be traveling together this morning.

We made arrangements as to where and when we were to meet.

THE COURT: What were those arrangements?

MR. ROSATO: I was supposed to meet him at his apartment at a quarter to nine this morning and we were to leave for the courthouse in his car. I was to leave my car there.

THE COURT: Where is the apartment located that you speak of?

MR. ROSATO: The apartment is -- Judge, I



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can give you a description of it but I don't know the actual address. It is a small street just off Yonkers Avenue where the Volvo dealership is located and it is a very small private street and travels south off Yonkers Avenue, and just at the bottom of a very short hill there is a brand new apartment house called Adrian something, and he has an apartment in that building. It is a fairly new apartment building.

THE COURT: Were you at the apartment this morning?

MR. ROSATO: Yes. After he hadn't come out for about 15 minutes, I went in and I was told by his wife that -- what I told the Court -- that he was there last night when he called me. He called me from his apartment. And then he immediately left the apartment and he hadn't returned all night. I, at that time, then called his parents. They had no knowledge of his whereabouts.

I spoke to the father, the mother, and the brother. The brother said he was leaving immediately to go look for him and --

THE COURT: When was this?

MR. ROSATO: That was this morning.

And I remained at the apartment until about



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9.25 and then I had to leave.

When I arrived here at about ten o'clock, a little after ten, I immediately called his wife again.

She said she received no word, and I immediately called the parents again. They received no word yet.

And I just now spoke to the wife again. She checked the garage where he keeps his only automobile and the automobile is in the garage.

She said that he did leave all of his keys in the apartment, which includes his car keys, house keys, and whatever keys she knows of that he has, and she had had no word, and she is quite perturbed herself.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: Your Honor, I move for the issuance of a bench warrant and I move that bail be revoked.

THE COURT: Bail is revoked and the bench warrant is ordered on a forthwith basis.

Have you any other information at all to indicate why this man is a fugitive or whether or not he is a fugitive?

MR. FRIEDMAN: Your Honor, I heard a rumor that there might be a contract out for Mr. Santoro's life. That's all it is, your Honor.

MR. ROSATO: Excuse me. Is this a recent

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2     rumor?

3             THE COURT: Let the record show that this absence  
4     on the part of Santoro, in light of the circumstances, was  
5     voluntary and intended, and clearly obstructs the progress  
6     of this case and is inexcusable, it being a voluntary  
7     absence.

8             There is no reason why, if the government so  
9     desires and believes that it is well advised to do so,  
10    to proceed with the impaneling of the jury with Mr. Santoro's  
11    counsel here present and participating, and in the meantime  
12    such search as may be conducted by the authorities can take  
13    place.

14            What is the government's disposition? We just  
15    can't sit here indefinitely in these circumstances.

16            MR. FRIEDMAN: Your Honor, may we have a few  
17    minutes to research the law in the matter of --

18            THE COURT: Your choice now is either to move  
19    for a discontinuance, a severance, or to proceed.

20            MR. FRIEDMAN: Yes, sir.

21            Your Honor, the government wishes to proceed.

22            Will counsel for the defendant Santoro consent  
23    to the picking of the jury in the absence of the defendant?

24            MR. LANDSMAN: Your Honor, I don't think we can  
25    consent to something like that. He is charged with a



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2 felony here.

3 THE COURT: I don't think it is necessary for  
4 you to consent in light of a deliberate voluntary absence  
5 of your client from the courtroom.

6 MR. LINDSMAN: Except, your Honor, that we don't  
7 know that to be a fact.

8 THE COURT: There is nothing against that as  
9 a fact, and suspicion and surmise, in light of the circum-  
10 stances, is not warranted.

11 MR. ROSATO: Except that it is an indication --

12 THE COURT: There is no indication whatsoever  
13 that this is anything other than a voluntary deliberate  
14 intentional absence.

15 MR. ROSATO: Except that his conversation with  
16 me last night, which is the last conversation anyone had  
17 with him, gave every indication that he would be here and  
18 that would be an indication that he did not intend not to be  
19 here.

20 THE COURT: Which he promptly contradicted  
21 by leaving the house immediately according to his wife's  
22 report to you.

23 MR. ROSATO: That would not be a contradiction,  
24 your Honor, only because he still had nine hours to meet  
25 me.

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2 MR. LANDSMAN: And it is only an hour and a  
3 half --

4 THE COURT: The Court believes and so finds that  
5 this is a voluntary deliberate absence from the courthouse  
6 and that there is no reasonable indication or excuse to  
7 explain the defendant's performance after talking to  
8 Mr. Rosato other than to believe that he deliberately took  
9 off so as to hobble this proceeding and trial.

10 Now I leave it to you, Mr. Friedman, to determine  
11 your course. What is your application? Do you want to  
12 proceed or do you want to have a continuance, or do you want  
13 a severance?

14 MR. FRIEDMAN: We wish to proceed, your Honor.

15 THE COURT: All right, we will pick a jury.

16 MR. LANDSMAN: Would your Honor note our  
17 objections to proceeding without the defendant being present?

18 THE COURT: You have made your objection.

19 MR. LANDSMAN: Thank you, your Honor.

20 THE COURT: And I hold the defendant's counsel  
21 duty bound to make every conceivable effort to locate  
22 this man and to bring him in for the forward progress and  
23 continuance of this trial.

24 In the meantime the United States Marshal is  
25 instructed to use every available facility to track him



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2 down.

3 (In the courtroom.)

4 (Panel of prospective jurors sworn.)

5 THE COURT: This matter having been called for  
6 and placed on trial on Tuesday, August 10, 1971, and certain  
7 of the defendants having responded that they were ready,  
8 and the matter having been duly continued for reasons  
9 sufficient to the Court at that time, and the trial now  
10 continuing on August 16, 1971, we will proceed to pick  
11 a jury.

12 THE CLERK: Juror No. 1, Anita Gioia.

13 Juror No. 2, Rocco F. Cavano.

14 Juror No. 3 is Mae Goldsmith.

15 Juror No. 4 is Harvey Hornstein.

16 Juror No. 5 is Dorothy Colt.

17 Juror No. 6 is Harry Miller.

18 Juror No. 7 is Miss Florence Sydlosky.

19 Juror No. 8 is Miss Virginia L. Swift.

20 Juror No. 9, Michael J. Stack.

21 Juror No. 10, Miss Arlene G. Berman.

22 Juror No. 11, Mrs. Deborah Nussbaum.

23 Juror No. 12, Venice Gray, Mr.

24 Alternate Juror No. 1, Betty Ann Sandbank, Miss.

25 Alternate Juror No. 2, Louis E. Lopez.

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2 over by the government, rather than the government is conceal-  
3 ing something.

4 THE COURT: I handle that very simply. You don't  
5 talk about it.

6 MR. ROSATO: Your Honor, may I state for the record --  
7 Mr. Landsman and I representing Mr. Santoro were at somewhat  
8 of a disadvantage having been assigned this matter last  
9 Tuesday at the very beginning, and compounded by the fact that  
10 Mr. Santoro has now absented himself, this has created a  
11 very difficult situation.

12 Having read the 3500 material last night has raised  
13 a number of questions which could only actually be answered  
14 by Santoro, because there is a number of references of  
15 conversations between Formiglia and Santoro which we have no  
16 way of either confirming or clarifying in any way.

17 For that reason, we feel that at certain points of  
18 the trial, maybe at our turn of cross examination or at the  
19 end of the people's case, or what have you, we may find  
20 it necessary to raise an objection for the reason that we  
21 feel totally --

22 THE COURT: An objection to what?

23 MR. ROSATO: To the fact that we want to continue  
24 our severance because of these disadvantages. I don't want  
25 to raise these objections during the trial and antagonize



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2 you --

3 THE COURT: You can't antagonize me.

4 MR. ROSATO: I don't want to raise these in the  
5 presence of the jury if at all possible.

6 THE COURT: Why don't you do this: "Your Honor,  
7 I wish to call to your attention the legal point that I have  
8 heretofore made in respect of my client."

9 MR. ROSATO: That is exactly what I want to ask your  
10 Honor. I can do that, fine. In that way I don't have  
11 to raise the ground or anything.

12 THE COURT: Don't ask me for bench conferences.  
13 Don't try offers of proof. Put your questions and don't  
14 get into colloquies.

15 MR. ROSATO: So that when we raise an objection,  
16 in other words, you will understand that it is the grounds  
17 that I am stating now.

18 THE COURT: I will understand that you are moving  
19 for severance.

20 MR. LANDSMAN: Your Honor, I would like to add for  
21 the record that we have been furnished with 3500 material  
22 and it's marked items A through Q, and some of these items  
23 run as much as 50 to 70 pages each. I assure your  
24 Honor that Mr. Santoro is mentioned at least once on every  
25 page, and it makes it extremely difficult without having

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2 him here to confer with.

3 THE COURT: Well, get word to Mr. Santoro that you  
4 are in difficulties and you want his cooperation.

5 MR. CHAPMAN: I suggest you use television and the  
6 public press. He will surely respond.

7 MR. ROSATO: How about a novena?

8 MR. COHN: Mr. Formiglia is going to be testifying.  
9 He is going to start off saying he met Santoro in such and  
10 such a date in November 1969. There is going to be no  
11 reference to our client until a considerable period of time  
12 thereafter. So as not to interrupt those proceedings, your  
13 Honor, I want to say now that we are, of course, going to  
14 object to anything that Mr. Santoro says not in the presence  
15 of Mr. Rattenni before Mr. Formiglia even ever met or heard  
16 of or knew Mr. Rattenni, we are going to object to that and  
17 we are going to ask your Honor if he doesn't sustain our  
18 objection to that, to give the appropriate limiting in-  
19 structions that this is binding only on Santoro and sub-  
20 ject to connection as to other defendants.

21 THE COURT: Mr. Cohn, in order to be sure that I  
22 have it precisely on the legal basis that you want, if  
23 you or Mr. Bolan would be good enough to write out the  
24 precise limitation you want me to give, I am sure that you  
25 will do it fairly, and I will give it in your words.

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your attention to the resolution of the facts.

I hope you have a pleasant afternoon for the balance of the day. Have a good rest and come here refreshed on time ready for everybody to do his particular job in the administration of justice.

Good afternoon.

(Jury leaves courtroom.)

MR. DIRENDO: If your Honor pleases --

THE COURT: Oh, you have some applications?

MR. DIRENDO: Yes.

THE COURT: I will hear those now then.

I will hear any applications. I think that Mr. Landsman had an application that he wanted to call to my attention.

MR. LANDSMAN: Yes, your Honor. I think the time has come where I have to apply further to the Court to sever this defendant from this case.

I find myself with my hands tied. I have no defendant to even exhibit to the jury, and I think that to go much further seems foolish, and I would move for a severance on the part of the defendant Santoro.

THE COURT: The Court's finding, until other facts appear to the Court, is that this defendant has voluntarily, deliberately and intentionally absented himself

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1 ebn [ 108]  
2 the commencement of the trial of this case which commenced  
3 on August 10th, with the knowledge that the case would go  
4 forward on August 16th following the appearance of the  
5 other defendants who are temporarily ill when the remainder  
6 of the case was marked ready. Until that situation changes,  
7 your application is denied.

8 MR. LANDSMAN: Your Honor, I would like to place  
9 on the record that it was my understanding that when the  
10 case was on the 10th it was adjourned until the following  
11 Monday, today, when we were to select a jury.

12 THE COURT: Then you will revise your under-  
13 standing in accordance with the record.

14 MR. DIRENZO: My application, if your Honor  
15 pleases, is to reinstate the bail of the defendant  
16 Joseph Chiaverini. That application I know your Honor  
17 has already passed upon, and I understand your Honor  
18 indicated that you would entertain it again today.

19 I would like to point out that the defendant  
20 is presently in court and I know he is here pursuant to  
21 the Court's mandate, and I know he is in the custody of  
22 the United States Marshal at this time.

23 Now, your Honor is satisfied that he has made  
24 a satisfactory and adequate recovery.

25 I might point out that this defendant enjoys

-56-



1-25-72

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X  
4 UNITED STATES OF AMERICA, :

5 -against- :

6 SAMUEL SANTORO, :

7 Defendant. :

71 Cr. 8

8 -----X  
9 January 25, 1971  
2:40 p.m.

10 Before:

11 HON. MILTON POLLACK,

12 District Judge.

13 APPEARANCES:

14 JOEL M. FRIEDMAN, ESQ.,  
Special Attorney  
15 Department of Justice.

16 VINCENT LEMMA, ESQ. and  
17 PETER ROSATO, ESQ.,  
Attorneys for Defendant.

18 ALSO PRESENT:

19 MARK LANDSMAN, ESQ.  
20  
21  
22  
23  
24  
25

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THE CLERK: United States of America against  
Samuel Santoro.

Is the government ready?

MR. FRIEDMAN: The government is ready.

THE CLERK: Is the defendant ready?

MR. ROSATO: The defense is ready.

THE COURT: Come up. Has there been any  
arraignment on the case of 71 Criminal 1071?

MR. FRIEDMAN: No, your Honor. There was a  
superseding indictment filed, 71 Cr. 1313.

THE COURT: I see. And 1071 is nolle prossed?

MR. FRIEDMAN: Yes, your Honor. I have been  
assured by Mr. Nolle that the nolle proesse was to be for  
your Honor's consideration some time today.

THE COURT: I have considered it and have  
signed the nolle proesse.

MR. FRIEDMAN: Thank you, your Honor.

THE COURT: Mr. Rosato, who will speak for the  
defendant, Samuel Santoro?

MR. ROSATO: I will, your Honor.

THE COURT: Mr. Rosato, is there anything  
you wish to say on behalf of Samuel Santoro in 71 Criminal 1071  
prior to sentence?

MR. ROSATO: Yes, your Honor.



1-25-72

[3]

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THE COURT: Please do so.

MR. ROSATO: Firstly, your Honor, I would like wish all due respect to repeat a motion that I believe I made at the conclusion of his trial, and that is to the effect that the Court did lack jurisdiction to try this defendant because of his unavailability, and just would like to repeat that motion, in a sense, that the verdict should be set aside because of the Court's lack of jurisdiction.

Secondly, I would like to say on behalf of the defendant merely that with regard to his unavailability at the time of trial, I did have occasion since his return, to speak with him and to discuss the very subject.

I would like to point out, bring to the court's attention, what the defendant did mention to me. That is, this is by way of explanation, your Honor, than any sort of a defense. But I would like to mention that he did say to me that at the time of his disappearance that he felt-somewhat panicked, felt that he was being compelled to face a most serious charge where he was confronted with perhaps imprisonment for the rest of his life, in effect, and for that reason he was being compelled to trial without counsel that he felt was the only one he had confidence in, was properly prepared and qualified to defend him.

1-25-71

1 GWX

[4]

2 For that reason he did panic and did flee  
3 with the thought and hope that perhaps this would hold  
4 the trial for a time when his counsel, counsel of his  
5 choice, Mr. Lanna, namely, would be available to defend  
6 him.

7 I offer that merely as explanation, your Honor,  
8 and to the reason why he did choose to disappear at that  
9 time.

10 THE COURT: I think you are familiar with the  
11 facts as to how the trial date was set, and that I believe  
12 it was at least three or four months in advance of the  
13 actual trial date. The case was set for trial pre-  
14 emptorily. Every lawyer in the case representing all the  
15 defendants, was present, other than Mr. Lanna, and each  
16 requested for convenience sake, postponements that would  
17 have made it difficult, if not impossible, to bring the  
18 case to trial, and it was at the suggestion and the instance  
19 of the attorneys for the various defendants that the Court  
20 was requested to undertake to try this case in the summertime.  
21 And I did cut short my vacation to come back on the agreed date  
22 in the middle of the summer, on a date that had been fixed, as  
23 I say, I believe in April of 1971.

24 And the case was duly set -re-emptorily against  
25 every party, including the government, for trial for August



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[5]

10th, according to the best of my recollection.

At that time Mr. Santoro and you were advised that with the repeated requests for consideration to Mr. Lanna, because he was going on military maneuvers not once and not twice, but three times in successive months, that if the maneuvers were more important than the representation of the defendant, that the defendant, that the defendant would have those three or four intervening months to obtain counsel adequately prepared and responsibly capable of taking care of the defendant's needs, and that some concession and consideration would have to be made or given somewhere with the conflicting demands on the time of the various other counsel in the case.

This particular case could have been procrastinated indefinitely. It isn't as though the defendant wasn't informed and advised.

My recollection further is that Mr. Lanna made it manifest to this defendant that the case would be set for trial. I think that he also indicated that Mr. Lanna proposed to go off on his military maneuvers for the third time in August and would not be available, and this defendant had ample opportunity to get ready and to obtain counsel.

Then to assure him of adequate representation.

(1-25)

[6]

jvx

1  
2 you, Mr. Lanna's partner, together with an extremely  
3 capable lawyer assigned by the court conducted the pro-  
4 ceedings. The case was marked ready on August 10th.  
5 Your client was in court. Your co-counsel requested to  
6 see the 3500 material and to obtain the various discovery  
7 and disclosure and cooperation, and it so happened that  
8 although the case was then ready and was on trial, that  
9 because of the situation with respect to two defendants  
10 who put themselves in a hospital just a day or so before  
11 the trial, that we were slightly delayed in actually  
12 going forward, that we didn't go forward on the 10th beyond  
13 everybody being present who should have been present rep-  
14 resented either in person or by attorney or both, and  
15 then with all of the information that was turned over  
16 to Mr. Landsman and to yourself after the case was marked  
17 ready on August 10th, this defendant took it into his head  
18 to -- that he was the target of the case, having been  
19 given a very substantial preview of the government's  
20 proposed evidence, and took off.

21 So I find it a little difficult to accept the  
22 explanation that you have proffered on this occasion,  
23 but that's neither here nor there. The fact of the matter  
24 is he violated the terms of his bail; he deliberately  
25 absented himself after the case had been set, as I say,



1-25-72

[7]

gwx

1  
2 pre-emptorily called for trial and actually on trial,  
3 subject to the interim delays, until the other two defen-  
4 dants were backed into the stall, so to speak.

5 And he remained away during the entire trial  
6 proceeding, until apprehended here recently.

7 Is there anything that you want to say on  
8 behalf of this defendant prior to sentence on the subject  
9 of sentence?

10 MR. ROSATO: No, your Honor.

11 THE COURT: You have said everything that  
12 you want to say?

13 MR. ROSATO: Yes, sir.

14 THE COURT: Samuel Santoro, is there anything  
15 you want to say before sentence in this matter?

16 DEFENDANT SANTORO: No, your Honor.

17 THE COURT: Is there anything that the government  
18 wishes to say in behalf of the government in connection  
19 with the sentence proceeding here?

20 MR. FRIEDMAN: Your Honor, the government  
21 does wish to say something, but first the government  
22 would ask that the record reflect that Mr. Landman is  
23 present in court today also, and possibly the Court wants  
24 to ask him if he would like to say something for the de-  
25 fendant.

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO VACATE SENTENCE

Petitioner, Samuel Santoro, by undersigned counsel, has moved this Court, pursuant to 28 U.S.C. § 2255, to vacate his sentence and set aside his judgment of conviction for violation of the Extortionate Credit Transaction Act, 18 U.S.C. § 891 et seq. (Docket No. 71 Cr. 6.) Petitioner's conviction was affirmed by the Second Circuit on direct appeal. United States v. Tortora, 464 F.2d 1202, cert. denied, sub nom. Santoro v. United States, 409 U.S. 1063 (1972). Because of the appeal, this Court may feel precluded from acting in this matter.<sup>1/</sup> However, this case is unusual both on the facts and on the law. Petitioner is serving a twelve-year term of imprisonment after conviction at a trial conducted entirely in his absence. No prior case can be found in which the law permitted such a trial to go forward.<sup>2/</sup> A § 2255

<sup>1/</sup> The Second Circuit based its affirmance primarily on the defendant's waiver of his right to be present at trial. The alternative ground of this petition, ineffective assistance of counsel, was not directly addressed by the Court of Appeals, and is, therefore, properly before this Court. See pp. 18-20, infra.

<sup>2/</sup> After the decision in United States v. Tortora, two other circuits have permitted trials in absentia. Government of Virgin Islands v. Brown, 507 F.2d 166 (3d Cir. 1975), United States v. Peterson, 524 F.2d 167, 182-86 (4th Cir. 1975), cert. denied, \_\_\_ U.S. \_\_\_, 96 S. Ct. 1136 (1976). These decisions expressly followed Tortora and are wrongly decided for the same reasons set forth below.



motion is designed to correct manifest injustice. Injustice was done in this case and it must be rectified.

#### I. INTRODUCTORY STATEMENT

The petition of Mr. Santoro recites the following facts:

Petitioner was indicted in January 1971, with four co-defendants, Joseph Chiaverini, Gene Genaro, John Tortora and Nicholas Ratteni, on extortion and conspiracy charges. Mr. Santoro retained Mr. Vincent Lanna to defend him in this case.

Trial was originally set for April 15, 1971. Because of scheduling difficulties, a pre-trial conference was held on April 15 to determine a time when the Court and the various lawyers would be available for trial. Mr. Peter Rosato appeared at that conference for Mr. Lanna, who was in trial on another matter. Although Mr. Rosato informed the Court that Lanna had military obligations that would bar him from appearing for trial during August, counsel for the other defendants agreed to begin trial on August 10 and the Court set the case down for that date. The Court instructed Mr. Rosato that Mr. Santoro should make other arrangements for counsel if Mr. Lanna would not be available.

Mr. Lanna encouraged petitioner to find another attorney and attempted to reschedule his military duties. He also requested the Court to move the trial to some other time. None of these efforts were successful. Nevertheless, Mr. Santoro maintained the hope that the trial would be continued or that Mr. Lanna would become available. Petitioner was opposed to finding a new lawyer because Mr. Lanna had already been involved in the case for several months, knew the surrounding facts and, Mr. Santoro believed, was the attorney best able to defend him.

On August 10, when Mr. Santoro appeared without Mr. Lanna or other counsel of his choice, the Court appointed Mr. Rosato and Mr. Mark Landsman to defend petitioner. Mr. Rosato argued that because of his inexperience in criminal matters and his unfamiliarity with both the facts of the case and federal court proceedings, he was not competent to defend petitioner. Mr. Landsman likewise informed the Court that he knew nothing of the case or of any defenses Mr. Santoro might have. The Court, understandably desirous of proceeding as expeditiously as possible in the multi-defendant case, rejected these arguments and directed Rosato and Landsman to assume responsibility for Mr. Santoro's defense.

Two other defendants did not appear on August 10 and the Court found that their voluntary hospitalization was insufficient excuse. The Court did not commence the trial, however, and the case was continued until August 16.

On August 16, Mr. Santoro did not appear for trial. The Court found that petitioner's absence was voluntary and deliberate and ordered that the trial begin as scheduled.<sup>3/</sup> Counsel for petitioner moved to continue the case or to sever, stating that they were unable to defend Mr. Santoro in his absence. The motion was denied. Jurors were selected and the Government opened its case.

Counsel for petitioner renewed the motion to sever several times. When the Government turned over voluminous transcripts of conversations between the chief Government witness and petitioner, Rosato and Landsman emphasized once more that their recent appointment to the case, complicated by their client's

<sup>3/</sup> At sentencing, Santoro explained through counsel that, at the time, he had been fearful of relying on unprepared lawyers to defend him against serious felony charges.



absence, prevented them from adequately analyzing the materials and thereby fairly defending petitioner. Severance again was denied.

At the close of the Government's case, the Court dismissed the charges against Genaro. Two other defendants presented witnesses on their behalf. Rosato and Landsman presented no witnesses or evidence on behalf of Santoro. The jury returned a verdict of acquittal for Chiaverini and Ratteni. Tortora and Santoro, who was still in absentia, were found guilty as charged. Counsel for Santoro moved to set aside the verdict. That motion was denied.

## II. ARGUMENT

### A. The Right to Effective Assistance of Counsel

The Sixth Amendment guarantees the assistance of counsel for all criminal defendants who face the possibility of imprisonment. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). The right to counsel means the right to effective assistance of counsel. Powell v. Alabama, 287 U.S. 45 (1932).

Because the Supreme Court has never defined in detail the standard of effectiveness the Constitution requires, the Courts of Appeals have developed their own tests. Thus far, the Second Circuit has adhered to the traditional test of whether the trial "shocks the conscience of the court" or is "a farce and a mockery of justice". United States v. Badalamante, 507 F.2d 12 (1974), cert. denied, 421 U.S. 911 (1975) (failure to object to continuances granted upon the request of other counsel, inter alia, did not constitute ineffective assistance of counsel). In recent years, other circuits have demanded stricter standards. In Tooley v. Rose, 507 F.2d 413, 414 (6th Cir. 1974), the court held that

the trial court must determine whether counsel "is reasonably likely to render and is rendering reasonably effective assistance."<sup>4/</sup>

(Tooley was remanded for consideration of whether failure to move for a continuance to permit a psychiatric evaluation of defendant violated that standard.) The Eighth Circuit inquires whether the representation provided by counsel was reasonably competent by prevailing professional standards. Johnson v. United States, 506 F.2d 640 (1974), cert. denied, 420 U.S. 978 (1975) (counsel not shown to be ineffective for convincing the defendant not to testify). The Seventh Circuit's somewhat less restrictive scope of inquiry is whether minimum standards of professional representation have been met. United States ex rel. Williams v. Twomey, 510 F.2d 634, 639 (1975) (failure to move for a continuance to investigate a co-defendant's role in the crime after last minute appointment to the case deprived defendant of effective assistance of counsel). Finally, the District of Columbia Circuit looks at whether the defendant received reasonably competent assistance of an attorney acting as a diligent advocate. United States v. Butler, 504 F.2d 220, 223 (1974) (attorney who was not a member of the bar of the District, had no previous trial experience, and committed several errors at trial did not adequately represent the defendant).

Under any of these standards, petitioner was deprived of the effective assistance of counsel as a result of both the eleventh-hour appointment of Rosato and Landsman and Rosato's inexperience. Moreover, these problems were seriously aggravated by the in absentia proceeding.

<sup>4/</sup> Accord MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified, 289 F.2d 928, cert. denied, 368 U.S. 877 (1961); cf. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975).



1. Belated Appointment of Counsel

In its seminal case on the effective assistance of counsel, the Supreme Court announced that the right to counsel comprehends the opportunity to confer with counsel in advance of trial to discuss possible defenses and to prepare the case. The Court held that when there is a duty to appoint counsel,

. . . that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

Powell v. Alabama, supra, at 71. The Court has restated this principle again and again. E.g., Chandler v. Fretag, 348 U.S. 3, 10 (1954); White v. Regan, 324 U.S. 760 (1945).

Recently, the Court held that a defendant is deprived of the right to the assistance of counsel merely by being denied the opportunity to consult with counsel during an overnight recess. The Court emphasized the importance to a criminal defense of the consultations between attorney and client that occur, not only prior to trial, but also throughout the time the trial is going on:

It is common practice during . . . recesses for an accused and counsel to discuss the event's of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.

Geders v. United States, \_\_\_ U.S. \_\_\_, 44 U.S.L.W. 4420, 4422 (U.S., March 30, 1976).

In the instant case, the Court appointed attorneys Landsman and Rosato only six days before Santoro's trial began. Although Rosato had made formal appearances in the case on be-

half of his partner, Vincent Lanna, who was petitioner's chosen counsel, neither Rosato nor Landsman knew anything of the substance of the case. In a colloquy with the Court on August 10, 1971, Mr. Rosato stated:

- I am totally unfamiliar with the facts of this case and the crimes charged in this case. I have never been privy to any conversations, strategy or defense consultations, [sic.] with Mr. Santoro or with my partner or present when these conversations took place. I have no knowledge of any defense, if any, that Mr. Santoro has in this case.

Transcript, August 10, 1971, p. 53, a copy of which is attached hereto as Exhibit 1. It appears that the two attorneys consulted with their client only once from August 10 until Santoro's disappearance. Quite obviously, they were deprived of all opportunity to consult with their client during the trial. This short preparation period and minimal opportunity for consultation deprived petitioner of the rights which Powell v. Alabama, supra, and its progeny sought to safeguard.

Several courts have held that shortness of preparation time alone violates the Sixth Amendment. In Twiford v. Peyton, 372 F.2d 670, 673 (4th Cir. 1967) (counsel appointed the day before trial and did not have an opportunity to interview or call an alibi witness), a showing of belated appointment or lack of preparation of counsel was held to constitute "a prima facie case of denial of effective assistance of counsel, so that the burden of proving lack of prejudice is shifted to the state." Accord, United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1213 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970).

The Second Circuit has held that the amount of time consumed in discussions with the client and in legal research alone does not determine whether the assistance of counsel was effective. "The proof of the efficiency of such assistance lies

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in the character of the resultant proceedings, . . ." United States v. Wight, 176 F.2d 376, 379 (1949); see also United States v. Bentvena, 319 F.2d 916, 935, cert. denied, 375 U.S. 940 (1963). In both Wight and Bentvena, the court found no evidence of lack of knowledge of the facts or of lack of preparedness. The court in Bentvena noted:

The contention that it was an abuse of discretion is belied by the zeal and quality of the performance rendered by defense counsel at trial and before this court.

319 F.2d at 935.

The proceedings in the instant case present a strikingly different picture. Counsel for petitioner offered little more by way of defense than a series of motions to sever. Counsel protested at the outset of the trial that they were not sufficiently prepared to go forward without their client. When the transcripts of the tapes central to the Government's case against petitioner were turned over to defense counsel, Landsman and Rosato emphasized their inability to analyze critical information they were learning for the first time. Finally, they could not present a defense because they had not had the opportunity to confer with Santoro about persons who should be called to testify.

All of these factors must be analyzed in light of the Supreme Court's admonition that the

right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Glasser v. United States, 315 U.S. 60, 76 (1942). We respectfully submit that under prevailing standards, petitioner was deprived of the effective assistance of counsel by the eleventh-hour appointment of counsel totally unfamiliar with the facts of this complex prosecution.

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## 2. Inexperience of Defense Counsel

Effective assistance of counsel under any of the more recently formulated standards requires, at the very least, that counsel be minimally competent. One of the factors to consider in determining whether the prescribed standard has been met is the experience of counsel. Inexperience of counsel, without more, ordinarily does not give rise to a presumption of ineffective assistance. But when inexperience is complicated by other factors, such as belated appointment in a complex, multi-defendant prosecution involving serious felony charges, the court is put on inquiry as to effectiveness in the particular case. United States ex rel. Williams v. Twomey, supra, at 638 (inexperienced counsel who was appointed shortly before trial and who did not ask for a continuance to permit him to investigate the charges in a burglary prosecution rendered ineffective assistance); see also MacKenna v. Ellis, supra, at 600 (same).

Rosato, co-counsel for petitioner, was trying one of his first criminal cases and his very first federal matter. In light of the numerous complicating factors, including not only his last-minute appointment, but also petitioner's absence and the central role which petitioner's conduct played in the Government's case against all five defendants, Rosato's inexperience must be deemed to have infringed petitioner's right to effective counsel. The appointment of Mark Landsman as co-counsel did not remedy the problem of Rosato's inexperience. The trial itself, in which the two conducted only limited cross-examination, presented no witness or evidence in defense, is evidence of the irreparable prejudice to petitioner.

## B. Right of Presence at Trial

Courts have long recognized the fundamental importance

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of the right of a criminal defendant to be present at his trial. "One of the most basic of the rights guaranteed by the Confrontation Clause<sup>5/</sup> is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (1970). It is a right "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455 (1912).

Samuel Santoro was convicted in this Court on a sixteen-count felony indictment without being present at any stage of the trial against him. Without conducting a hearing, this Court held that petitioner had waived his right to be present at trial. Petitioner respectfully submits that the decision to proceed with the trial in his absence was a fundamental violation of his constitutional rights for two distinct reasons: (1) the right of a defendant to be present at the commencement of his trial is mandatory under the Sixth Amendment and Rule 43 of the Federal Rules of Criminal Procedure; and (2) the evidence upon which the Court relied is wholly insufficient to support a finding that petitioner's failure to appear was a knowing and voluntary waiver of his right to be present at trial.

1. Mandatory Presence

At the time of petitioner's trial, Rule 43 of the Federal Rules of Criminal Procedure provided in pertinent part:<sup>6/</sup>

<sup>5/</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him . . . ."

<sup>6/</sup> Rule 43 was amended in 1975 to reflect the Supreme Court's holding in Illinois v. Allen, 397 U.S. 337 (1970). Federal Rules of Criminal Procedure Amendments Act of 1975, §§ 2, 3(35), 89 Stat. 370, 376, Pub. L. No. 94-64. The only changes to the portion of the text quoted above are editorial in nature, and are not substantive modifications. See Advisory Committee Notes to 1975 Amendment, 18 U.S.C.A. Rule 43.

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." (Emphasis supplied)

The clear implication of the above-quoted portion of Rule 43 is that in noncapital felony cases,<sup>7/</sup> presence at arraignment, at commencement of the trial, and at imposition of sentence is mandatory and cannot be waived by the defendant.<sup>8/</sup> This Court need not determine the precise moment when a trial "commences" for purposes of Rule 43. It is sufficient to note, as the Second Circuit recognized in this case, that a jury trial cannot commence at least until the process of jury selection has begun. United States v. Tortoro, supra, at 1208-1209; see also Diaz v. United States, supra, at 453. Selection of the jury in Santoro's trial did not begin until August 16, 1971, and it is undisputed that Santoro was not present on that date or anytime thereafter.

Where a rule or statute is unambiguous, there is no need to resort to legislative history to determine its meaning. Wilbur v. United States, 284 U.S. 231, 237 (1931); Manufacturer's

<sup>7/</sup> Rule 43 provides that where the defendant is charged only with misdemeanors, he may waive his presence at any stage of the proceedings.

<sup>8/</sup> In his discussion of Rule 43, Professor Moore comments:

"In felony cases, presence at arraignment, at the time of plea, at commencement of the trial, and at imposition of sentence is mandatory, i.e., defendant has no power of waiver. In felony and misdemeanor cases, presence at the trial may be waived by defendant's voluntary absence after the trial has been commenced in his presence." (Emphasis supplied)

8 A Moore's Federal Practice ¶43.02[2] (2d ed. 1965).



Hanover Trust v. Commissioner of Internal Revenue, 431 F.2d 664, 667 (2d Cir. 1970). But even if the meaning of Rule 43 were unclear -- which it is not -- a consideration of the Advisory Committee Notes serves to dispel any doubt as to its requirements. The Advisory Committee on the Rules of Criminal Procedure, in its 1943 Notes on the Preliminary Draft of Rule 38, which was subsequently enacted as Rule 43, explains the Rule as follows:

The second sentence permits continuance of trials both in felony cases if the crime is not punishable by death and in misdemeanor cases when the defendant by his voluntary act absents himself after the commencement of the trial. Under this provision the defendant is required to be present at arraignment and plea and the trial must be begun in his presence. (Emphasis supplied)

The Advisory Committee Notes accompanying Rule 43, as promulgated two years later, explains the Rule in similar terms. Simply put, Santoro's conviction can be upheld only by ignoring the clear mandate of Rule 43 that the presence of the accused at the commencement of trial is mandatory.

On petitioner's direct appeal from his conviction, the Second Circuit dismissed this contention with the observation that "[l]ike any constitutional guarantee, the defendant's right to be present at trial may be waived". United States v. Tortora, supra, at 1208.<sup>9/</sup> This observation is fundamentally unsound as a

<sup>9/</sup> Elsewhere in its opinion, the Second Circuit indicates that its concern is not so much over the concept of a non-waivable right, but the stage of the proceedings at which the presence of the defendant is required. The Court apparently has no disagreement, for example, with the requirement of Rule 43 that the defendant must be present in court to plead to the charges against him. Id. at 1209. Yet if, under proper circumstances, the defendant may waive the requirement that he be present at the commencement of trial, the right to be present at time of arraignment or sentencing presumably may also be waived. Certainly, nothing in the language or logic of the Second Circuit's decision would point to a different conclusion as to waiver.

(Footnote continued)

matter of law and, more importantly, ignores the crucial distinction between rights mandated by the Constitution and the power of a legislature to extend those rights by statute.

The Commonwealth of Virginia, for example, has long held as a matter of state constitutional law that the right to be present at every stage of the trial is considered so fundamental that it may not be waived. See Ingram v. Peyton, 367 F.2d 933, 937 (4th Cir. 1966), and cases cited therein. Under common law, only in capital cases has the accused been required to be present at every stage of the proceedings. "Where the offense is not capital and the accused not in custody," the Supreme Court has noted, "the prevailing rule has been that if, after the trial has begun in his presence, he voluntarily absents himself, this . . . operates as a waiver of his right to be present." Diaz v. United States, supra, at 455 (emphasis supplied).

The clear implication of the "prevailing rule" noted by the Supreme Court is that the defendant's presence at the beginning of the trial is not waivable.<sup>10/</sup> State and federal

(Footnote continued)

9/ Rule 43 also provides, by implication, that a defendant charged with a capital crime has a non-waivable right to be present at every stage of his trial. Presumably, under the Second Circuit analysis, this right is also waivable. The application of the Second Circuit's analysis to other portions of Rule 43 would thus make meaningless the careful distinctions drawn by that Rule. Surely, no such result was intended by the draftsmen of Rule 43.

10/ Indeed, in earlier cases, the Supreme Court has announced an even broader requirement. In Lewis v. United States, 146 U.S. 370, 372 (1892), the Court reversed the conviction of a defendant absent when challenges to the jurors were being made, stating:

A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. . . . [I]n felonies, it is not in the power of the prisoner either by himself or his counsel, to waive the right to be personally present during the trial.



courts have consistently adopted this view. See, e.g., Cureton v. United States, 130 U.S. App. D.C. 22, 396 F.2d 671 (D.C. Cir. 1968) (Rule 43 not violated because defendant was present when trial began and voluntarily absented himself thereafter); United States v. Vassalo, 52 F.2d 699 (E.D. Mich. 1931) (same); United States v. Noble, 294 F. 639 (D. Mont. 1923), aff'd, 300 F. 689 (9th Cir. 1924) (no error in giving further instructions to the jury in the defendant's absence); United States v. Barracota, 45 F. Supp. 38 (S.D.N.Y. 1942) (trial could continue when defendant disappeared during an adjournment). The rule is based not on particular provisions of state statutes but on common law and the federal constitutional guarantees of due process and right of confrontation of adverse witnesses.

The Second Circuit's holding that the right of personal presence at any portion of the proceedings may be waived has been rejected consistently by the Supreme Court and the overwhelming majority of the federal and state courts. The Second Circuit's reliance on Snyder v. Massachusetts, 291 U.S. 82 (1934), is misplaced. Snyder held simply that the jury's view of the scene of a crime is not a part of the trial at which a defendant must be present. Dictum in Snyder that a defendant may waive his right to be present is, of course, correct as to most stages of the trial. That statement, however, was not directed to the right of the accused to be present at the commencement of trial and certainly was not intended to overrule the well-established prior body of law making an accused's presence at that stage mandatory.

Even assuming that the Constitution does not make the defendant's presence at the commencement of trial mandatory, Congress and the states are unquestionably free to enact such a requirement. For example, in Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court held that, under the circumstances of the case

before it, a five-year delay after indictment in bringing the defendant to trial did not violate his constitutional right to a speedy trial. Congress has since provided in the Speedy Trial Act that all federal criminal defendants must be brought to trial within sixty days of indictment. 18 U.S.C. § 3161. Likewise, the right to counsel accorded by the Supreme Court to persons facing parole or probation revocation in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973), has been expanded by Congress in the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219.

Indeed, various jurisdictions have enacted statutes designed to require the presence of the defendant at all or designated portions of the proceedings against him. Such statutes have been scrupulously enforced by the courts. In Hopt v. Utah, 110 U.S. 574 (1884), the Supreme Court was required to construe a provision of the criminal code of procedure of the Territory of Utah which required, in terms similar to Federal Rules of Criminal Procedure 43, that a defendant, if tried for a felony, must be personally present at his trial. At his felony trial, defendant Hopt challenged certain jurors for cause, but the challenge was ultimately decided out of the presence of the defendant. Hopt did not agree to this procedure, continued with trial, and was convicted. The Supreme Court reversed his conviction, holding that under Utah law, the right of the defendant to be present at each stage of his trial was mandatory and could not be waived:

We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial . . . . [T]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his

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life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. Id. at 579.

The statutes involved in these cases are substantially similar in terms to Rule 43. Each case construing such a statute recognizes that where the statute provides that a defendant "must" or "shall" be present at a specified stage of trial, no waiver is possible. The same result is required under Rule 43.<sup>11/</sup> Only by a legerdemain can the mandatory presence of the accused at the commencement of trial be read out of Rule 43. Only the Supreme Court in its rule-making capacity or the Congress can so amend Rule 43.

The requirement of Rule 43 and the Sixth Amendment has a sound basis in public policy: to assure beyond any doubt that an accused is aware that a trial against him has begun and to eliminate any possible confusion in the defendant's mind concerning his obligations, rights and the possible serious consequences of his acts. To safeguard the countervailing public interest in the orderly administration of justice, Congress has provided substantial penalties for a defendant who fails to appear for trial after being released on bail. See 18 U.S.C. § 3150.<sup>12/</sup> Of course, once he has been returned to custody, the Government may still bring a defendant to trial for the original charges as well as for failure to appear. The Government's inconvenience in proceeding separately against an absent defendant, however, cannot

<sup>11/</sup> Indeed, this Court recognized that Santoro's presence at the commencement of trial was required, but found that requirement satisfied by his presence on August 10th, when the case was called for trial. Since no proceedings were conducted on this date, the Second Circuit held that trial did not commence until August 16th, when the jury was impaneled. United States v. Tortora, *supra*, at 1209.

<sup>12/</sup> Santoro pled guilty to a charge of failure to appear and is serving the maximum five year term for that offense concurrently with his other sentences.

justify the evisceration of this fundamental guarantee. As the Supreme Court has proclaimed, constitutional rights "cannot be measured in minutes and hours or dollars and cents". Taylor v. Hayes, 418 U.S. 488, 500 (1974).

This procedure is not merely a matter of sound public policy. It is required by the Sixth Amendment and the clear language of Rule 43. Accordingly, Santoro's conviction after a trial at which he was never present is not authorized by law and must be vacated.

## 2. Waiver

Even assuming that the defendant's presence at the commencement of trial was waivable, no legally sufficient waiver was made in this case. The Supreme Court has held that waiver of fundamental rights requires "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The determination of whether an intelligent waiver has occurred must be made on the basis of the particular facts and surrounding circumstances. Finally, "courts must indulge every reasonable presumption" against such a waiver. Id.

The facts before the Court compel the conclusion that petitioner did not knowingly or intelligently relinquish his right to be present at trial. Petitioner promptly appeared at all prior court proceedings at which his presence was required. His continued insistence upon representation by Mr. Lanna indicated his desire to vigorously defend himself against the charges he faced. Furthermore, this Court's own course of action in refusing to proceed with trial on August 10 put petitioner on notice that

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the case against him would not be prosecuted in his absence.<sup>13/</sup>  
 However inartful and ill chosen a means of asserting his rights  
 petitioner's absence may represent, it cannot reasonably be thought  
 to reflect an intelligent and knowing waiver of those rights.

C. Inapplicability of Res Judicata

To the extent that any issues raised in this motion can  
 be deemed to have been raised on direct appeal in United States  
v. Tortora, supra, this Court is not bound by those decisions  
 under the doctrine of res judicata. At common law, res judicata  
 did not apply to habeas corpus actions. Salinger v. Loisel, 265  
 U.S. 224, 230 (1924). The motion to vacate sentence created by  
 28 U.S.C. § 2255 preserves the habeas corpus remedy and merely  
 provides a more convenient forum in which to launch a collateral  
 attack upon a criminal conviction. United States v. Hayman, 342  
 U.S. 205 (1952). Thus, the rule of non-applicability of res  
judicata in habeas corpus actions applies equally to § 2255  
 motions. The Supreme Court has recognized that "adequate protec-  
 tion of constitutional rights requires the continuing availability  
 of a mechanism for relief." Kaufman v. United States, 394 U.S.  
 217, 226 (1969) (emphasis supplied).

In establishing the rule that res judicata does not  
 apply to successive motions under § 2255, the Supreme Court held

<sup>13/</sup> This is different from the situation in Taylor v. United  
States, 414 U.S. 17 (1973), where the court merely failed to  
 warn the defendant that the trial, already commenced, would  
 continue in his absence. In Taylor, the Court of Appeals  
 also had concluded from an independent review of transcripts  
 of the trial and sentencing hearing that the defendant had  
 known that he was entitled to be present and that his absence  
 was the product of voluntary choice. Id. at 18, n.2. In the  
 case at bar, the Court's refusal to proceed with the trial in  
 the absence of two of petitioner's co-defendants affirmative-  
 ly suggested to petitioner that the trial would not begin  
 without him.

that circumstances may arise in which a court can give controlling weight to a prior denial of relief. Sanders v. United States, 373 U.S. 1 (1963).<sup>14/</sup> The rule is not one of jurisdiction but of the sound discretion of the District Court. Thus, in Sanders, supra, at 15-17, the Court said:

Controlling weight may be given to a denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

The Court continued:

. . . the foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized.

On direct appeal in this case, petitioner raised, and the Second Circuit decided on the merits, the Rule 43 claim. It has been demonstrated above, however, that the "ends of justice" require a reconsideration of that decision because it is contrary to all prior law and at odds with the plain meaning of the Rule.

Petitioner also raised on appeal the issue of ineffective assistance of counsel. The Second Circuit did not directly address that question in its opinion. Thus, under the Sanders test, petitioner is entitled to renew this claim both because it has not yet been decided against him on the merits and because the manifest ends of justice so require.

The Second Circuit narrowly construes Sanders and has frequently stated that it will not reconsider in a § 2255 motion issues previously raised on appeal. E.g., Kapatos v. United States,

<sup>14/</sup> The rule of Sanders v. United States, supra, applies equally where the original claim for relief is made by way of direct appeal rather than by collateral attack. Kaufman v. United States, supra, at 227 n.8.



432 F.2d 110 (1970), cert. denied, 401 U.S. 909 (1971); United States v. Granello, 402 F.2d 337 (1968), cert. denied, 393 U.S. 1095 (1969); Castellana v. United States, 378 F.2d 231 (1967); United States v. Thompson, 261 F.2d 809 (1958). Nevertheless, in some of the same cases in which the court has announced its rule against reconsidering previously raised issues, it has also stated that it did conduct an independent review of the record. In Castellana v. United States, supra, at 233, the court stated that § 2255 may not "be employed to relitigate questions which were raised and considered on appeal", but it also noted that:

. . . We have, nevertheless, reviewed the record of the first trial which was before this Court on the initial appeal and given meticulous care to the points raised and the assertions which the appellants appeared to make on this appeal.

Id. at 232, n.3; see also United States v. Thompson, supra, at 810.

Sanders v. United States, supra, establishes beyond doubt that no court may flatly refuse to reconsider any claims in a § 2255 motion which have been raised previously. The facts of this case, we respectfully urge, demonstrate that this Court has a duty to consider anew the claims placed before it in this motion.

### III. CONCLUSION

In the recorded annals of federal jurisprudence, Samuel Santoro is the first defendant to be convicted of a serious felony charge at a trial conducted entirely in absentia. In United States v. Tortora, supra, at 1210 n.7, the Second Circuit restricted its holding permitting such a practice to multiple-defendant cases. Clearly, that court implicitly recognized that its decision was a major departure from the long-standing rule making an accused's presence at the commencement of trial mandatory. The Second Circuit also implicitly acknowledged that the precedent they were

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establishing seriously threatened the interests of the individual defendant in a multi-defendant prosecution. Such fundamental interests as the defendant's right to be present at his own trial must not be frittered away by the charging process -- a function wholly within the hands of the Government.

The result of the decision of the Second Circuit is that Samuel Santoro is serving a twelve-year term of imprisonment after a trial at which he was not present and at which his interests were protected only by two attorneys who by their own admission were not sufficiently prepared to go forward without him. This is a case of manifest injustice and one peculiarly appropriate for relief pursuant to 18 U.S.C. § 2255.

Respectfully submitted,

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July 26, 1976

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When I said this was agreed to on the trial record, what I was saying was that those who found themselves incapable in any way of proceeding as directed were to afford satisfactory substitutes. I think the conduct of Mr. Lamm in this connection doesn't meet the obligations of an officer of this court.

I propose to do the following. You are Mr. Lanna's partner, you have been involved in this case in one or another respect since the response to the indictment. My record shows here that you signed an appearance, dated 9. Rosato, for Vincent W. Lanna, in the case of Santoro, and in my recollection dated 10. Consequently, you signed for Mr. Lanna also a notice of appearance for Gene Caputo who has since come into the case through Mr. Repley.

Under the powers of the Court, I assign you to represent Mr. Santoro in this case, and I direct that you be present on each and every occasion that any proceeding in this matter goes forth and during the entire course of the trial.

I will also, should you so request it and should your effort so request it, endeavor further south to assist Mr. Costello and McQuinn, if you so desire, and

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2 in that connection I have asked a lawyer of sufficient  
3 ability in the opinion of the Court and having the confidence  
4 of the Court to appear here this morning to find out whether  
5 or not additional counsel is desired. Is Mr. Landsman  
6 in court?

7 MR. LANDSMAN: Yes, your Honor.

8 THE COURT: Mr. Mark Landsman has stated that he  
9 would be in court this morning. He has now heard the  
10 entire situation, and it is up to you, Mr. Rosato, as one  
11 of the assigned counsel directed to appear and proceed in  
12 this matter, to discuss the matter with your client, Mr.  
13 Santoro, as to whether or not you desire to associate Mr.  
14 Landsman with this case.

15 MR. ROSATO: Your Honor, may I be heard?

16 THE COURT: You definitely may be heard.

17 MR. ROSATO: Firstly, your Honor, I have never  
18 actively participated in this case, except --

19 THE COURT: This will be your opportunity to do  
20 so.

21 MR. ROSATO: I just wanted, insofar as passing, to  
22 say I have never actively participated in any part of this  
23 case, except as a leg man, so to speak, for Mr. Lanna, who  
24 happened to be on that day on trial. He merely asked me  
25 to appear in his behalf. Whatever appearance I may have



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made in court has always been for Mr. Lanna and never on my own.

Secondly, as I understood your Honor's direction last April, I believe Mr. Lanna, and I conveyed that direction to Mr. Lanna, I believe Mr. Lanna has carried out your direction. He has made every effort to persuade Mr. Santoro to seek other counsel.

THE COURT: That's not what the directive was.

MR. ROSATO: He has informed Mr. Santoro that he absolutely was not available to try the case on August 10th and that he himself must decide to either get new counsel or try the case without counsel, but he must make that decision, and he informed Mr. Santoro on several occasions on that point starting last April or May when I first conveyed this direction to Mr. Lanna.

THE COURT: Just to break in on your thought, Rule 4 of the rules of this court directs that no lawyer shall be relieved except on order of the Court for good cause shown.

MR. ROSATO: I believe your Honor --

THE COURT: Mr. Lanna has not been relieved, and all deal with the subject of Mr. Lanna separately on another occasion.

MR. ROSATO: As we understood your direction, we thought we understood your direction to be that we should

lhbr 6

2 make every effort to obtain other counsel or assist Mr.  
3 Santoro to obtain other counsel or urge him to obtain other  
4 counsel, and we have done that to the best of our ability.  
5 At least Mr. Lanna has stated that he has done that to the  
6 best of his ability.

7 Thirdly, I might say that although I am a practicing  
8 attorney, I have only actually been in continuous  
9 criminal practice for one year, I have tried very, very few  
10 cases, criminal cases. I have never practiced in the Federal  
11 Court. I am totally unfamiliar with federal law and pro-  
12 cedures. I am totally unfamiliar with the facts of this  
13 case and the crimes charged in this case. I have never  
14 been privy to any conversations, strategy or defense con-  
15 sultations, with Mr. Santoro or with my partner or present  
16 when these conversations took place.

17 I have no knowledge of any defense, if any, that  
18 Mr. Santoro has in this case.

19 THE COURT: I am sure that your presence will be  
20 an aid and comfort to Mr. Santoro and my direction that you  
21 are assigned stands.

22 MR. ROSENBERG: I only bring that to your Honor's  
23 attention for the record. I thought you said that you con-  
24 cluded that I was adequate counsel, and I just want to remind  
the Court that I don't know what you base that on --



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THE COURT: I have provided for you an available addition which your client and you may accept as your pleasure.

MR. ROSATO: Is he assigned by the Court or does he have to be --

THE COURT: That is a subject that I will discuss with you after your client, you and Mr. Landsman have a conversation.

MR. ROSATO: All right.

MR. FRIEDMAN: Your Honor, might I suggest that the Court inquire whether Mr. Santoro wishes to appear pro se.

THE COURT: That inquiry is not appropriate until after Mr. Santoro and Mr. Rosato have talked to Mr. Landsman. That takes care of the appearances for the moment.

Is there any report from these gentlemen in the hospital?

MR. DIBENIO: I communicated with the hospital and spoke to Mr. Chiaverini. He tells me that he has just been given two hypodermic needles and that they are taking him down for additional tests, which tests they are going to require. I understand they are very painful, they will require a general anesthesia.

I advised him, consonant with your Honor's

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2 directive, told him exactly what your Honor has done.

3 I am conveying the message.

4 THE COURT: Thank you.

5 Mr. Chapman?

6 MR. CHAPMAN: I spoke to Mr. Tortora as well at the  
 7 hospital. He advises me that in the early hours of this  
 8 morning he had another very severe attack. While I was  
 9 talking to him he had just about started, maybe five or ten  
 10 minutes before, an intravenous injection, which is the usual  
 11 treatment of pexidine, which is an opium, and as I was in-  
 12 formed by the doctor, and other drugs, and that the usual  
 13 treatment lasts between five and nine hours.

14 THE COURT: In short words, is he coming or isn't  
 15 he?

16 MR. CHAPMAN: He cannot come.

17 THE COURT: All right. The Court will take a  
 18 15-minute recess. Mr. Friedman, you do whatever is necessary  
 19 under the circumstances and I will hear from you again. Bear  
 20 in mind, gentlemen, that against this peremptory trial date  
 21 the government has gone to great expense to have that panel,  
 22 and it is sitting out there and costing the government  
 23 \$2,000 or more for the convening of that panel while these  
 24 gentlemen take procedural or apparently optional treat-  
 25 ments at St. John's Hospital.

26 We will stand in recess for 15 minutes.

27 (Recess.)



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2 THE COURT: Mr. Rosato, have you got any-  
3 thing to report to the Court with respect to our  
4 problem?

5 MR. ROSATO: I have spoken to Mr. Santoro,  
6 and perhaps it would be better if Mr. Santoro just told  
7 the Court what he feels.

8 THE COURT: All right. Come forward,  
9 Mr. Santoro.

10 DEFENDANT SANTORO: Your Honor, I talked  
11 with Mr. Landsman, and he says that he knows nothing  
12 of the case, he has no background or anything of the  
13 case. And I also talked to Mr. Rosato, and he seems  
14 to know nothing about it at all either. The only one  
15 that knows anything about it is Mr. Lanna.

16 THE COURT: That was a subject that you  
17 were given adequate notice of on April 15th. The word  
18 on April 15th was that you are required now, meaning then,  
19 April 15th, to get yourself an adequate substitute.  
20 So your choice at the present time to go forward by your-  
21 self without a lawyer, which would be foolish, to go  
22 forward with the assistance of Mr. Rosato and to supple-  
23 ment that assistance, if you want, with the assistance  
24 and advice of an experienced lawyer like Mr. Mark Lands-  
25 man. You can make the choice.

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The case cannot be delayed for the third of the opportunities of Mr. Lanna to go off marching in his duties. That's something that should have been provided for on April 15th.

Now, Mr. Rosato reports that they repeatedly urged you to make other arrangements. The fact that you did not is your responsibility.

DEFENDANT SANTORO: Your Honor, I spoke with Mr. Lanna several times, and up until about, I would say, approximately two weeks ago he was still trying to get that this reserve thing, whatever he has--he was still trying to get a postponement so that he could be here.

Then when he called --

THE COURT: We are in a practical situation, as you can see. You can't have, in a multiple-party case, somebody falling out of step. The whole thing can't just wait on somebody's reserve duties, or whatever it is, because I assure you that in two weeks from now some other lawyer is going to have a problem and some other client is going to have a problem.

So you try to accommodate all of those problems as best you can by having advance notice. You can go forward by yourself. Do you want to go forward



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1 I had

2 by yourself without a lawyer?

3 DEFENDANT SANTORO: No, I don't want to  
4 go forward without a lawyer, no.

5 THE COURT: I have assigned Mr. Rosato  
6 to sit here to help you and advise you. You now have  
7 the opportunity to employ or to utilize Mr. Landsman.  
8 Do you want him?

9 DEFENDANT SANTORO: Do I want this Mr.  
10 Landsman?

11 THE COURT: Yes.

12 DEFENDANT SANTORO: I don't know, your Honor.  
13 From what I talked to him, he doesn't know anything  
14 about it.

15 THE COURT: It is up to you to inform him  
16 sufficiently, because your choice is to have been ready  
17 at 10 o'clock this morning, and to be ready with a lawyer  
18 or to go forward by yourself.

19 Now, the next best thing is, instead of  
20 going forward by yourself, to get whatever assistance  
21 you can out of these two lawyers or one of them, which-  
22 ever you prefer.

23 DEFENDANT SANTORO: Your Honor, from what I  
24 understand now, I am the key figure in this. I mean,  
they are looking to put me behind bars.

1 has

2 Lanna being in Camp Smith is not of his own volition.

3 He is under orders out of Washington --

4 THE COURT: I don't want to get mixed up  
5 with the U. S. Military.

6 MR. ROSATO: I want to show he is not here  
7 not out of his own choice.

8 THE COURT: I don't want to get mixed up  
9 with the U. S. Military, and whether those orders were  
10 subsequent or prior to the Court's order --

11 MR. ROSATO: They were prior to, far prior.

12 I would like the record to show that Mr.  
13 Santoro was not in court on April 15th.

14 DEFENDANT SANTORO: No, I wasn't here, your  
15 Honor.

16 MR. ROSATO: He recalls that.

17 THE COURT: I thought I recalled his pre-  
18 sence here.

19 MR. ROSATO: He was not.

20 THE COURT: The record is perfectly clear  
21 and you have discussed it many times, as you said, so  
22 that there is no question of lack of notice. Let's not  
23 go hunting for squirrels while we are interested in the  
24 bear. We are interested now in how do you want to go  
25 forward. That you will go forward, I assure you.



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2 But how do you want to do it? Do you want to do  
3 it only with Mr. Rosato? Do you want to do it with  
4 Mr. Landsman, too, to the extent that he can give  
5 you advice, suggestions, counsel, bring out the matters  
6 that have to be brought out and attend to your aspect  
7 of the trial as best he can? That's your question that  
8 you have to decide.

9 DEFENDANT SANTORO: Could I speak to them  
10 about this?

11 THE COURT: Sure, go right ahead.

12 Is Mr. Friedman still engaged?

13 MR. KAPLAN: Mr. Friedman is speaking  
14 to the marshals. I would like to report briefly on our  
15 efforts to get a doctor. We have gotten the police  
16 surgeon for the Westchester Parkway Police, Dr. Schneider.

17 THE COURT: The Court will order that that  
18 that doctor go over to the St. John's Hospital to  
19 examine both of these people, and immediately at the  
20 conclusion of the examination to communicate with the  
21 Court, an oral report, to be followed up in due course  
22 with a written confirmation of the report.

23 Mr. Dimento, you have no objection to the  
24 examination?

25 MR. DIMENTO: No.

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2 THE COURT: Mr. Drenzo, I have nobody in  
3 mind at this moment, but I assure you that I will seek  
4 the best available medical opinion that is available to  
5 make a medical examination and report, and the minute I  
6 ascertain who that is, my office will give you the in-  
7 formation.

8 MR. DRENZO: I just want an opportunity  
9 for his personal physician.

10 THE COURT: I will work on that this after-  
11 noon. I will probably call up the New York Medical  
12 Society and find out who is available.

13 MR. DRENZO: Thank you, your Honor.

14 MR. LANDSMAN: Your Honor --

15 THE COURT: Are you now in the case?

16 MR. LANDSMAN: It looks like I am to some  
17 extent, your Honor. There are some things that I  
18 think have to be worked out. However, I have had  
19 an opportunity to talk to some of the attorneys in this  
20 case over the lunch break, and they have been very coopera-  
21 tive, and I suddenly found myself with a defendant who  
22 apparently appears to be the main defendant or close to  
23 the main defendant in this case.

24 THE COURT: I don't think that this is the  
25 time to characterize the unimportance or importance of

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AFFIDAVIT IN OPPOSITION TO  
PETITIONER'S MOTION TO VACATE SENTENCE

STATE OF NEW YORK                     )  
COUNTY OF NEW YORK                 : ss.:  
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL D. ABZUG, being duly sworn, deposes and says:

1. I am a Special Attorney, United States Department of Justice, assigned to the above-captioned case and, as such, I am familiar with the facts therein.
2. I make this affidavit in opposition to the petitioner SANTORO's motion to vacate sentence pursuant to Title 28, United States Code, Section 2255.
3. On January 7, 1971, a Special Grand Jury empaneled in this District returned a sealed, multi-defendant indictment which charged SANTORO with seven counts of collecting extensions of credit by extortionate means in violation of Title 18, United States Code, Section 894, eight counts of financing extortionate extensions of credit in violation of Title 18, United States Code, Section 893, one count of making extortionate extensions of credit in violation of Title 18, United States Code, Section 892, and one count of conspiring to commit the aforementioned statutes in violation of Title 18, United States Code, Section 371.
4. On January 8, 1971, the indictment was ordered unsealed by the Honorable Constance B. Motley, United States District Judge for the Southern District of New York.
5. On April 15, 1971, counsel for all parties appeared before this Court to schedule a date for trial. The Court scheduled trial for August 10, 1971. Petitioner's counsel, Peter Rosato, advised the Court that his associate, Vincent Lanna, would be unavailable to try the case in August because of his military obligations. Affording the petitioner four months to comply with its Order, the Court directed Rosato that SANTORU should find another trial attorney if Lanna could not appear.

6. On August 10, 1971, despite the Court's explicit Order to retain substitute counsel if Lanna was unavailable, SANTORO moved for an adjournment citing Lanna's unavailability. The Court appointed Mr. Rosato and Mr. Mark Landsman to represent SANTORO at trial which was re-scheduled to commence on August 16, 1976.

7. On August 16, 1971, SANTORO was not present at trial. Based upon the foregoing record, and in absence of evidence to the contrary, the Court found that SANTORO's absence was a voluntary and deliberate defiance of the Court's Order that his trial commence on August 16th. Accordingly, trial commenced without him.

8. On August 24, 1971, both sides rested and the jury convicted SANTORO on all counts charged in the indictment.

9. On November 24, 1971, a Special Grand Jury empaneled in this District returned an indictment which charged SANTORO with one count of bail jumping in violation of Title 18, United States Code, Section 3150 (Dkt. No. 71 Cr. 1313).

10. On January 25, 1972, the Honorable Milton Pollack, United States District Judge for the Southern District of New York sentenced petitioner to a term of twelve years imprisonment; five years on Count One and seven years on Counts Two through Sixteen, the seven-year sentence to be served consecutively to the five-year term. The Court also imposed a five-year concurrent term for failure to appear to which the petitioner had pled guilty on that day. Petitioner began serving those sentences immediately.

11. Petitioner appealed his August 24th conviction on the grounds, inter alia, that he had been denied counsel of his choice and his right to confront his accusers. These contentions were rejected. United States v. Tortora, 464 F.2d, 1202 (2d Cir.), cert. denied, sub nom. Santoro v. United States, 409 U.S. 1063 (1972) (Douglas, J. dissenting).

12. In his motion to vacate his sentence, SANTORO seeks to re-litigate the issue of whether he was denied his right to confront his accusers and also claims that he was denied effective assistance of counsel. For the reasons set forth in the accompanying memorandum of law these claims are spurious and wholly without merit.

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MICHAEL D. ABZUG  
Special Attorney  
U.S. Department of Justice

Sworn to before me this  
day of August, 1976



GOVERNMENT'S MEMORANDUM OF LAW

This memorandum is submitted in opposition to the petitioner's motion to vacate his sentence.

I. THIS COURT SHOULD REFUSE TO CONSIDER A MOTION TO VACATE SENTENCE BASED ON A CLAIM REJECTED AT TRIAL AND ON APPEAL

It is well-settled that "Section 2255 cannot be employed to relitigate questions which were raised and considered on the appeal." Torriente v. United States, 379 F.Supp. 70, 72 (S.D.N.Y. 1974); Castellana v. United States, 378 F.2d 231, 233 (2d Cir. 1967). Despite this well-reasoned rule of judicial economy, the petitioner vaguely claims that this Court has "a duty" to re-consider the exact argument squarely rejected on his appeal because of "the facts of (his) case." (Petitioner's Memorandum of Law, page 20)

The record underlying the petitioner's argument was exhaustively reviewed by the Second Circuit. United States v. Tortora, 464 F.2d, 1202 (2d Cir.), cert. denied, sub nom. Santoro v. United States, 409 U.S. 1063 (1972). Based upon his detailed review, the Circuit found that SANTORO had made a voluntary and knowing decision to not attend his trial and that because of other "extraordinary" factors present in the case, such as the numerous delays already experienced

and danger to Government witnesses should an adjournment occur because of the defendant's unjustifiable absence, there were no constitutional constraints on the Court proceeding to trial without the petitioner. "A defendant's knowing and deliberate absence does not deprive the Court of the power to begin the trial and to continue it until a verdict is reached." United States v. Tortora, supra, 1209.

Based on this record and the Second Circuit's unequivocal rejection of his claim, the Government respectfully submits that this Court should not re-consider his complaint that he was denied his right to confront his accusers.

II. THE PETITIONER WAIVED HIS RIGHT TO CONFRONT HIS ACCUSER AT TRIAL AND TO EFFECTIVE ASSISTANCE OF COUNSEL

Though the petitioner disputes the finding made by this Court and the Court of Appeals that he voluntarily waived his right to confrontation, the Government submits that this finding was amply supported by the record and by no means clearly erroneous. United States v. Wilson, 510 F.2d 551, 553 (2d Cir. 1975). Assuming waiver, this Circuit's resolution of the petitioner's appeal is not only dispositive of his confrontation claim but, necessarily, of his claim that he was denied effective assistance of counsel. Without conceding that his claim has any factual merit\*, it is evident that any diminution in the quality of his legal representation can be directly attributed to the petitioner's failure to obtain substitute counsel despite this Court's warning, four months before his trial commenced, that he should obtain another lawyer if Mr. Lanna was going to be unavailable.

\* It is evident that the petitioner's representation at trial was not so inadequate as to make the trial "a mockery of justice" United States v. Miller, 254 F.2d 523, 524 (2d Cir. 1958). This Circuit held that no prejudice resulted from the unavailability of Lanna. United States v. Santoro, supra.

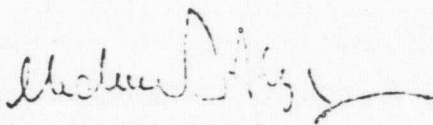


III. CONCLUSION

For the foregoing reasons, the Government respectfully asserts that the petitioner's motion should be, in all respects, denied.

Respectfully submitted,

ROBERT B. FISKE, JR.  
United States Attorney for the  
Southern District of New York



MICHAEL D. ADZUG  
Special Attorney  
U.S. Department of Justice

of Counsel

MEMORANDUM

The nub of this § 2255 application is the newly retained lawyer's statement that Tortora was followed by Govt. of V.I. v. Brown, 507 F.2d 186 (3d Cir. 1975) and United States v. Peterson, 524 F.2d 167, 182-186 (4th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 96 S. Ct. 1136 (1976) and that, "These decisions expressly followed Tortora and are wrongly decided"....

"Sec. 2255 cannot be 'employed to relitigate questions which were raised and considered on the appeal'." Torriente v. United States, 379 F. Supp. 70, 72 (S.D.N.Y. 1974); Castellano v. United States, 378 F.2d 231, 233 (2d Cir. 1967); United States v. Granello, 403 F.2d 337, 338 (2d Cir.), cert. denied, 393 U.S. 1095 (1969).

Santoro voluntarily and knowingly decided not to attend his trial after being furnished with the 3500 material from which it dawned on him that he was at the center of the prosecution and not on the outside, and he accordingly fled.

The Second Circuit has time and again noted that to assume constitutional proportions stringent standards are applied to claims of inadequacy of counsel. United States v. Joyce, \_\_\_ F.2d \_\_\_, Dkt. No. 76-1182 (2d Cir. Sept. 20, 1976). Nothing before this Court or in the record indicated that the team of attorneys provided for Santoro represented ineffective assistance or that a constitutional right was deprived.

There is no doubt that the trial of Santoro would have proceeded with the team of two attorneys provided to act for him but for Santoro's discovery that the government witnesses held the key to his conviction



as Santoro came to realize from the information furnished by the government to his lawyers including the 3500 material made available to them in advance of testimony from the government witnesses.

Santoro had four months to arm himself with counsel -- the law partner or associate of Mr. Lanna had activated himself on Santoro's behalf theretofore, and the Court appointed attorney to assist the former represented adequate additions to a pro se representation in default of having selected another attorney <sup>1/</sup> during a period of four months to make that selection.

The files and records of this case demonstrate beyond peradventure that a hearing on the petition is unnecessary. 28 U.S.C. § 2255; Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969).

The petition to vacate sentence is, in all respects, denied.

SO ORDERED.

*Milton Pollack*

September 21, 1976

Milton Pollack  
U.S. District Judge

<sup>1/</sup> When Santoro was ultimately apprehended and given allocation rights on the conviction and on the bail jumping charge to which he pleaded guilty, his lawyer was one of those assigned to assist him at trial.

NOTICE OF APPEAL

Notice is hereby given that Samuel Santoro, Petitioner in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of the United States District Court for the Southern District of New York denying Petitioner's Petition to Vacate Sentence entered in this action on the 22nd day of September, 1976.

Date: September 29, 1976

WILLIAMS, CONNOLLY & CALIFANO

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WALL & BECK

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CLERK'S CERTIFICATE

I, RAYMOND F. BURGARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- B \_\_\_\_\_, and the original filed papers numbered 1 thru 6 \_\_\_\_\_, and exhibits -0- \_\_\_\_\_, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED \_\_\_\_\_

PROCEEDINGS \_\_\_\_\_

None

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this \_\_\_\_\_ day of October \_\_\_\_\_, in the year of our Lord, One thousand nine hundred and seventy-six \_\_\_\_\_, and of the Independence of the United States the 200th \_\_\_\_\_ year.

*Raymond F. Burgardt*  
Clerk of the Court

BEST COPY AVAILABLE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SAMUEL SANTORO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

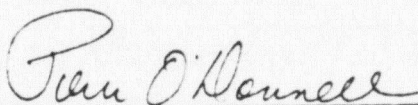
Respondent-Appellee.

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No. 76-2125

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief for  
Petitioner-Appellant and the Joint Appendix and one copy of  
Petitioner-Appellant's Suggestion For Initial Hearing En Banc  
and supporting Memorandum of Points and Authorities were mailed  
to Michael D. Abzug, Esq., United States Department of Justice,  
New York Joint Strike Force, One St. Andrews Plaza, Third Floor,  
New York, New York, 10007, this 18<sup>th</sup> day of November, 1976.

  
PIERCE O'DONNELL

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